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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. **76-601**

RACHEL EVANS, STEVEN R. KIDD, FERNELL
PATTERSON, WALTER V. BROOKS, JR.,

Petitioners,

—v.—

CARLA A. HILLS, Secretary, Department of Housing and Urban
Development, JOSEPH D. MONTICCIOLO, Area Director,
New York Office Department of Housing and Urban Develop-
ment, S. WILLIAM GREEN, Regional Administrator, Depart-
ment of Housing and Urban Development, THE DEPARTMENT
OF HOUSING AND URBAN DEVELOPMENT, THOMAS S.
KLEPPE, Secretary of the Department of the Interior,
DARREL LEWIS, Director of the Bureau of Outdoor Recrea-
tion of the Department of the Interior. THE DEPARTMENT
OF THE INTERIOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	3
The HUD Grant	5
The Interior Grant	7
The Proceedings Below	7
Reasons for Granting the Writ	
I. As the decision below indicates, there are sharply divergent views among the federal judges as to the propriety of extending the doctrine of <i>Warth v. Seldin</i> to a context in which Congress has mandated benefits for a class and where an agency of the executive branch fails to carry out that legislative mandate. This Court should grant review to resolve this divergence and to prevent the extension of <i>Warth</i> to the point where federal agencies can exercise with impunity a "silent veto" over civil rights legislation	10
Conclusion	16

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Association of Data Processing, Inc. v. Camp</i> , 397 U.S. 150 (1970)	13, 14
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	14
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968) ..	15
<i>Linda R.S. v. Richard D.</i> , 410 U.S. 614 (1973)	13
<i>Simon v. Eastern Kentucky Welfare Rights Organization</i> , 48 L.Ed.2d 450 (1976)	14
<i>Trafficante v. Metropolitan Life Ins. Co.</i> , 409 U.S. 205 (1973)	13, 15
<i>United States v. Richardson</i> , 418 U.S. 166 (1974) ..	11
<i>United States v. SCRAP</i> , 412 U.S. 669 (1973)	13, 14
<i>Warth v. Seldin</i> , 495 F.2d 1187 (2d Cir. 1974) ...	8, 9, 10, 13
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	3, 8, 13
Statutes:	
Administrative Procedure Act, 5 U.S.C. § 702	3, 14, 15
Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.	2, 3, 11, 12, 14
Title VIII, Civil Rights Act of 1968, 42 U.S.C. § 3601, et seq.	2, 3, 11, 12, 15
42 U.S.C. § 3608	14, 15
42 U.S.C. § 3608(c)	11
42 U.S.C. § 3608(d)(5)	11
42 U.S.C. § 3610	14
42 U.S.C. § 3612	14, 15

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—v.—

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the ruling of the United States Court of Appeals for the Second Circuit, *en banc*, which affirmed the dismissal of this action.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, on rehearing *en banc*, affirming the District Court's decision dismissing petitioners' action, which is reported at 537 F.2d 589, is appended hereto at A1.* The opinion of the three judge panel of the Court of Appeals for the Second Circuit, which is reported at 537 F.2d 571, is appended hereto at A51. The opinion of the United States District Court for the Southern District of New York, which is reported at 376 F.Supp. 327, is appended hereto at A89.

Jurisdiction

The decision of the United States Court of Appeals for the Second Circuit, on rehearing *en banc*, was rendered on June 4, 1976. Pursuant to the order of Mr. Justice Marshall, dated August 18, 1976, petitioners were granted an extension of time in which to file this petition to and including November 1, 1976. This petition is filed within that time requirement. Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1).

Question Presented

Whether the doctrine set forth in *Warth v. Seldin* should be extended to a context in which Congress has mandated benefits for a class and where an agency of the executive branch fails to carry out that mandate.

Statutes Involved

Title VIII of Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*; Title VI of the Civil Rights Act of 1964, 42 U.S.C.

* In this petition "A" refers to the appendix filed in this Court with the petition; "a" refers to the appendix filed with the Court below.

§ 2000d, *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 702.

Statement of the Case

This petition seeks review of a decision by a sharply divided Court of Appeals, sitting *en banc* which held that petitioners lack standing to sue. The Court of Appeals divided on the question of whether it was appropriate to extend the doctrine of *Warth v. Seldin*, 422 U.S. 490 (1975)—forged in the context of broad constitutional claims against local zoning laws—to a case involving specific statutory challenges to federal agency decisions. Four of the ten judges sitting *en banc* dissented from the decision of the Court which accepted this extension of the *Warth* doctrine.

The petitioners are lower income minority residents of racially impacted areas of Westchester County, New York who seek to challenge grants by the Department of Housing and Urban Development (HUD) and the Department of the Interior to the Town of New Castle, a "predominantly white and well-to-do enclave" within the same County (A91).

The contested HUD grant is to aid New Castle in the development of a new sanitary sewer system; the Interior grant is for an open space project. It is asserted in the complaint that HUD and Interior, in making these grants, violated the requirements of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Law), 42 U.S.C. 3601, *et seq.*, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d), *et seq.* Petitioners maintain, *inter alia*, that the two agencies failed to follow their own civil rights procedures, that prior to approval of challenged grants the agencies were required to evaluate the economic and racial consequences of New Castle's housing and development practices, and that the grant approvals, made in the

face of the Town's discriminatory land use policies, have the effect of maintaining racial residential segregation in Westchester County, thereby perpetuating petitioners' continued residency in the County's racial ghettos (A94).

Westchester is a large suburban county situated immediately north of New York City. Petitioners live in the Westchester communities of Yonkers, Peekskill, White Plains and Ossining. These communities, along with Mount Vernon and New Rochelle, contain about 75% of the total non-white population in the County. About 10% of the County population is non-white and the minority population of New Castle is only 1.3% (A92).

The minority residents of Westchester are compelled to reside in racially concentrated neighborhoods in the County. For example, petitioner Patterson asserts in an affidavit filed in support of his claim to standing, that he has "resided in Westchester County since 1960, and during that time, I have always been constrained to reside in racially concentrated areas." Patterson's neighborhoods have always been "characterized by dilapidated housing and inadequate levels of municipal services" (87a-88a).

Petitioner Brooks alleges that he resides in a severely dilapidated apartment in Ossining (4a). Petitioner Evans was compelled to relocate from two different dwellings in Peekskill as a result of urban renewal demolitions (2a). Subsequent to the filing of the complaint Evans obtained a unit in a public housing development in Peekskill. Petitioner Kidd resides in a dwelling with serious plumbing and structural defects (3a). The District Court concluded that the petitioners' allegations of ghetto living conditions "are a very real and serious 'injury'" (A96).

New Castle is a wealthy, developing, exclusionary suburb. The 1970 median family income in the Town was over \$22,000 as compared with \$11,349 for the County as a whole (A92). New Castle encompasses about 25 square miles in area and has substantial amounts of vacant land.

About 90% of the Town is restricted, however, by local zoning laws, to development of single family units on parcels of at least one acre (26a-27a). Two-family homes, garden apartments and all other forms of multi-family housing are prohibited (26a-27a). This pattern has resulted in the exclusion of housing for lower income families. The district court in surveying the facts found that the median value of single family homes in New Castle in 1970 was in excess of \$50,000 and that New Castle had "successfully thwarted" attempts by the New York State Urban Development Corporation to "construct a small 100 unit low-cost housing facility in the town. It is thus clear that New Castle continues to be resistant to attempts to alter its present housing character" (A92).

The HUD Grant

In 1969, New Castle, through a specially organized sewer district, requested aid from HUD under the Federal Water and Sewer Facilities Grant Program (42 U.S.C. 3102) for construction of a sanitary sewer facility in the hamlet of Chappaqua in New Castle. In early 1973, HUD approved that application.* As part of the civil rights review procedure that HUD followed for sewer grant applications, a "rating sheet" was to be completed by HUD officials on all proposed projects.

The record indicates that HUD at best paid little attention to the civil rights requirements in reviewing the New Castle sewer program application. Indeed, when a civil rights complaint was filed with HUD with respect to this grant, Department officials were unable to locate any rat-

* The sewer grant program in question has since been consolidated by Congress into the block grant community development program under the Housing and Community Development Act of 1974. 42 U.S.C. 5301, *et seq.* Currently, qualifying communities obtain block grant development funds which may be used for sewer projects or other development activities as designated in the 1974 Act.

ing sheet in the administrative file. To rectify this omission, an employee was directed to "reconstruct" the rating sheet (140a). The employee backdated the rating sheet to the time of the original award to New Castle to make it appear that the document was prepared contemporaneously with the review of the application (144a, 147a). When the administrative file was first turned over to petitioners and the Court, no explanation of the manner of the preparation of the rating report was provided (220a-221a).

Also, as a result of the civil rights complaint, HUD officials undertook to rate the New Castle application *de novo*. This review was conducted in the Regional Office of HUD. The new rating indicated that the New Castle application should have received no more than approximately 30 points (176a), instead of the 41 point total that appears in the reconstructed rating sheet (189a-190a). According to HUD officials, had the application received only 30 points when first reviewed, the grant would never have been awarded to New Castle (177a).

It is significant that the program approved by HUD will result in a sewer system which can only accommodate development of low density housing. Judge Oakes, in his dissenting opinion below, noted in this regard:

The sewer grant is inconsistent with construction of high-density, low-cost housing in New Castle because, as is stated in an affidavit attached to the complaint, the sewer system planned by New Castle "will have the capacity to handle the needs of the area only if the area is developed at low densities. . . ." . . . [The] affidavit charged that HUD review of the sewer grant had wholly ignored the role which sewer systems play in shaping the parameters of future community development, and the impact of that development on low and moderate income housing opportunities within the region (A36).

The Interior Grant

In 1972 New Castle applied to the Bureau of Outdoor Recreation of the Department of the Interior for federal funds to aid in the acquisition and development of a public park and outdoor recreation area. That application was submitted pursuant to the Land and Water Conservation Fund Act, 16 U.S.C., § 460l-8. New Castle sought to acquire and develop approximately 33 acres of town land for an outdoor recreation area.

With respect to the Interior grant, there were no civil rights enforcement procedures. The Interior officials made no effort to determine the nature of New Castle's housing and community development practices and in fact were unaware of any obligation flowing from the Fair Housing Act obligating them to promote fair housing opportunities in connection with an outdoor recreation grant (202a-204a, 207a).

The Proceedings Below

Petitioners' complaint was filed in the United States District Court for the Southern District of New York in August, 1973. It was filed as a class action on behalf of low income minority residents of Westchester County (1a). Prior to answering, the federal respondents moved to dismiss the complaint on several grounds, including lack of standing of the petitioners to bring this action (A89). Petitioners moved for a preliminary injunction restraining the federal agencies from distributing any monies to New Castle pursuant to the contested grants (A89).

The District Court, after hearing argument on these motions, reserved decision and ordered that the administrative files be made available to the Court and that depositions of certain officials be taken (A91).

On March 9, 1974, the Town of New Castle and the special sewer district moved to intervene in this action. These respondents also joined in the pending motion to dismiss for lack of standing (A89-90).

On May 22, 1974, the District Court dismissed the complaint on the grounds that the petitioners lacked standing to sue (A89). In reaching its decision, the District Court relied heavily on the Second Circuit's then recent decision in *Warth v. Seldin*, 495 F.2d 1187 (2d Cir. 1974) (A94-99).*

On June 2, 1975, a three judge panel of the Second Circuit with one member dissenting reversed the District Court holding (A51). On August 11, 1975, the Second Circuit granted petitions by the respondents for the appeal to be reheard *en banc*. The August 11th order also provided that Judge Moore, a senior judge who had participated in the initial panel, would sit with the permanent members of the Court on the rehearing.

On June 4, 1976, the Court issued its opinion. Six members of the Court disagreed with the first panel's holding and affirmed the District Court's dismissal of the complaint. Four members of the Court dissented.

Central to the majority's view was that the instant case was controlled by this Court's ruling in *Warth v. Seldin*, 422 U.S. 490 (1975). Judge Moore, writing for the majority stated that like the petitioners in *Warth*, who challenged exclusionary and discriminatory zoning laws in the suburban town of Penfield, New York on constitutional grounds, the petitioners here too have failed to allege facts "indicative of injury suffered by them as a result of the grants" to New Castle (A15).

The dissenting members of the Court asserted that the instant case is sharply distinguishable from *Warth*. Judge Oakes noted that the issue in *Warth* was "whether a town in which the plaintiffs are not resident may exclude persons of low and moderate income by its zoning laws" (A30-31), while the instant case involves a claim of non-compliance

* Petitioners' motion to certify the class was not resolved in the District Court because of the granting of the motion to dismiss (A100, n. 9).

by federal agencies with statutory civil rights requirements and not a constitutional challenge as in *Warth*. Judge Oakes also stated that the majority simply missed the point of the lawsuit in asserting that petitioners looked to use of the funds for other projects in the County in the event of disapproval of the grants.

Rather, appellants' claim is that the federal departments violated affirmative action requirements of the Civil Rights Acts by making grants to municipalities without evaluating the economic and racial consequence of their housing and development practices, with the effect of maintaining racial residential segregation in Westchester County, further constraining them to continued residence in the county's ghetto (A33).

Judge Oakes emphasized that the petitioners' injury flowed from agency non-compliance with Congressionally dictated civil rights requirements and that the non-compliance tended to perpetuate economic and racially discriminatory housing practices in the County. This harm, Judge Oakes stated, was sufficient to grant petitioners standing to contest the agencies' deviations from their statutory obligations.

Government actions which allegedly perpetuate (if not exacerbate) the injurious conditions of segregative housing seem quite plainly to effect an injury-in-fact to the precise type of interest which Congress intended to protect when it enacted Titles VI and VIII of the Civil Rights Act. The apparent thrust of those Titles is to assure that federal grants are consistent with the objectives of non-discriminatory, fair housing (A37).

Reasons for Granting the Writ

I.

As the decision below indicates, there are sharply divergent views among the federal judges as to the propriety of extending the doctrine of *Warth v. Seldin* to a context in which Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. This Court should grant review to resolve this divergence and to prevent the extension of *Warth* to the point where federal agencies can exercise with impunity a "silent veto" over civil rights legislation.

The Second Circuit in denying standing to petitioners held that the *Warth* decision was controlling and that the petitioners lacked sufficient injury to permit them to challenge HUD and Interior's alleged non-compliance with civil rights statutes. The lower court has thus extended the *Warth* doctrine, which was articulated in the framework of a broad constitutional challenge to suburban restrictive zoning practices, to the area of judicial review of administrative actions in a civil rights context.

Judge Gurfein, in his opinion on the rehearing, succinctly set forth the dissenting judges' fundamental objection to the extension of *Warth* in this fashion. Judge Gurfein observed:

There is need for judicial action where Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative mandate. The contrary would give the Executive a silent veto not provided in the Constitution (A48-49).

The dissenters strongly argued that this case differed substantially from *Warth* and that grave and unwarranted

restrictions have been placed by the Court on the types of litigants who may seek judicial review of agency non-compliance with civil rights statutes.

The effect of the holding below may well be to foreclose all federal judicial review in this area. If minority citizens subjected to residency in racial ghettos in Westchester County lack standing to contest an agency refusal to apply a Congressional directive to act affirmatively to alleviate their condition, then truly no party will be able to show sufficient injury to be entitled to enter the judicial forum. Nor, in this case is it adequate to look for a response through the political process for the alleged legal wrong. See *United States v. Richardson*, 418 U.S. 166 (1974). The political process itself has already functioned through the enactment of a body of civil rights laws. Congress has created the requirements that federal agencies act affirmatively to promote equal housing opportunities and the issue in this case is only whether the beneficiaries of those laws may seek judicial redress to insure administrative compliance.

The petitioners charge in their complaint that HUD and Interior, in approving community development grants to New Castle, failed to comply with the directives of Title VIII of the Civil Rights Act of 1968 and Title VI of the Civil Rights Act of 1964 requiring affirmative action to secure equal housing opportunities and an end to discrimination in federal programs. Title VIII of the 1968 Law provides in 42 U.S.C. § 3608(d)(5) that the Secretary of HUD must "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the purposes" of the Fair Housing Law. 42 U.S.C. 3608(c) applies the same affirmative action mandate with respect to programs of housing and urban development to all other federal executive departments and agencies. That section also instructs that these other agencies cooperate with HUD in this endeavor. These directives are to be read in conjunction with the legislative

purpose of the Fair Housing Law which establishes that, "It is the policy of the United States to provide within Constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. Title VI of the Civil Rights Act of 1964 bars discrimination in federal programs and requires affirmative action by governmental departments to achieve equal opportunities in such programs. 42 U.S.C. §§ 2000d and 2000d-1.

There is no doubt that a major goal of these statutes is to eliminate patterns of residential segregation and the confinement of minority citizens to ghetto areas. HUD itself, for example, deemed the affirmative action requirements of the Fair Housing Law as applicable to sewer grants to suburban communities and designed the civil rights rating sheet as a means of responding to the Congressional directive. Further, the nature of a sewer development in a suburban town plays a critical role in "shaping the parameters of future community development" and has a critical impact on possible development of "low or moderate income housing opportunities within the region" (A36).

The lower income minority petitioners in this case suffer from a lack of fair housing opportunities in a county in which they now reside. They are residents of minority ghetto communities of Westchester County. But for a lack of civil rights enforcement alleged in the complaint—allegations supported by the administrative records in this action—the petitioners would have had the benefit of a significant federal impetus for creation of fair housing opportunities and the elimination of racial residential segregation in the County. This impetus was what Congress sought in enacting the affirmative action requirements of the Fair Housing Law and Title VI. Petitioners maintain therefore that they are directly and immediately injured by the failure of these agencies to comply with a Congressionally dictated policy.

The Second Circuit applied *Warth v. Seldin*, to foreclose judicial challenges to agency non-compliance with the affirmative action mandate, although the complainants in *Warth* did not assert "any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claims." 422 U.S. at 513. In *Warth*, the Court also stated that, "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. 422 U.S. at 513-514. See, also, *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n. 3 (1973); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1973).

It should be noted that, with respect to the statutory claim involved in this case, this Court in *Trafficante* declared that the Fair Housing Act evinced a Congressional intention to define standing as broadly as is permitted by Article III of the Constitution. 409 U.S. at 209. In *Trafficante* white persons were held to have standing even though they were not the object of discrimination. The injury alleged was "loss of important benefits from interracial association." 409 U.S. at 210. The adversary interest of the petitioners here is even more compelling as they suffer directly from discrimination and continued ghetto residency.

Furthermore, in *Association of Data Processing, Inc. v. Camp*, 397 U.S. 150, 154 (1970), the Court, in analyzing the concept of "aggrieved" persons entitled to challenge a federal agency action or inaction, emphasized, "Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of 'aggrieved persons' is symptomatic of that trend." In *United States v. SCRAP*, 412 U.S. 669 (1973), the plaintiffs were found to have standing to question the Interstate Commerce Commission's alleged violation of the National Environmental Policy Act of 1969 (NEPA), 42

U.S.C. 4332(2)(c), in allowing a rate increase for railroad freight. Standing was found notwithstanding an "attenuated line of causation." 412 U.S. at 688. See also *Barlow v. Collins*, 397 U.S. 159 (1970).

The decision below in the instant matter deviates substantially from the *Data Processing*, *SCRAP*, and *Barlow v. Collins* holdings, which call for judicial scrutiny of agency actions.* This Court should resolve whether in fact *Warth* limits these decisions as the Second Circuit suggests.

The majority opinions below also fail to address the issue of the applicability of the Administrative Procedure Act, 5 U.S.C. § 702. Judge Mansfield, in his concurring opinion, focuses instead on the terms of the civil rights statutes and asserts that there is no authority in either 42 U.S.C. 2000d, *et seq.*, or 42 U.S.C. § 3608, granting to individuals a right to sue. He therefore concludes that the petitioners had no standing to contest the non-enforcement by the federal officials of these civil rights provisions (A22-23).

With respect to the Fair Housing legislation, Judge Mansfield states that § 3612, which authorizes the filing of private civil actions to enforce certain provisions of the Fair Housing Law, does not make reference to the requirements imposed on administrative agencies under § 3608. Judge Mansfield also notes that § 3610 is "limited to suits against private persons alleged to have violated the Act, which may be brought only after voluntary compliance proceedings before the Secretary of HUD have failed" (A23). Judge Mansfield concludes, "Surely if Congress

* This Court's recent holding in *Simon v. Eastern Kentucky Welfare Rights Organization*, 48 L.Ed. 2d 450 (1976), does not conflict with this line of cases. The *Simon* case arose in the unique context of a challenge to the tax status of a third party. Also the *Simon* claimants challenged the propriety of a ruling promulgated by the IRS, the agency charged with the duty of interpreting and enforcing the Internal Revenue Code. The issue here is far different as the challenge goes to the matter of official non-compliance with a clear statutory directive.

had intended judicial review of HUD's alleged maladministration of the Act, it would not have excluded § 3608 from those sections that might be enforced by private action" (A23).

The obvious response to this position is that the Administrative Procedure Act, 5 U.S.C. § 702, has long granted to an "aggrieved person" the right to remedy in a judicial proceeding administrative inactions. There is no presumption flowing from the terms of § 3612 that Congress intended the Administrative Procedure Act to be inapplicable to the Fair Housing Law. The more logical assumption is that Congress made specific reference to enforcement by civil action of §§ 3603-3606 under § 3612 because new rights were being established and there existed a need to create a jurisdictional basis for enforcing those rights.

Certainly, the legislative history of Title VIII indicates a congressional intent to correct the federal government's own sordid involvement in supporting segregation in housing and an intent to break down ghetto walls (See, A60-61). It is also clear that Congress in enacting both the 1964 and 1968 Civil Rights laws was responding to a call for action by a host of governmental commissions and agencies for remedial legislation in the area of housing and civil rights. As Mr. Justice Stewart stated in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968), Title VIII establishes a "detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." In *Trafficante*, the Court stated that in connection with fair housing litigation, "a main generating force must be private suits . . ." and that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns' [quoting Senator Mondale]." 409 U.S. at 211.

Congress certainly sought through the civil rights legislation, and particularly through Title VIII, to relieve patterns of residential segregation. A primary method for

accomplishment of that goal was by aggressive administrative acts at the federal level. Congress called upon the federal agencies to act affirmatively to meet that goal. The intended beneficiaries of such action are by necessity those residing in pockets of racial isolation in our metropolitan communities. They are the "aggrieved" class and they are the ones who must, and do, have standing to insure that the Congressional mandate is complied with.

Petitioners strongly urge that they should not be foreclosed from a trial on the critical issues raised in this matter. They should not be denied this right at the threshold of their lawsuit by an argument that they do not present sufficient adversity of interest to merit a hearing. The very spirit, policy and purpose of the laws in question virtually dictate that the courts assume jurisdiction. Without such an assumption of judicial responsibility, the laws in question may well become a mere dead letter and a mockery of the efforts of Congress to enact remedies to protect the rights of minority citizens.

CONCLUSION

For the foregoing reasons, petitioners respectfully urge this Court to grant this writ of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
Opinion of the Court of Appeals On Rehearing En Banc, June 4, 1976	A1
Opinion of the Court of Appeals, June 2, 1975	A51
Opinion of the District Court	A89

A1

OPINION OF THE COURT OF APPEALS ON REHEARING
EN BANC, JUNE 4, 1976

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 157—September Term, 1974.

(Submitted October 20, 1975 Decided June 4, 1976.)

EN BANC

Docket No. 74-1793

RACHEL EVANS, et al.,

Appellants,

—against—

CARLA A. HILLS, Secretary, Department of Housing
and Urban Development, et al.,

Appellees,

—and—

THE TOWN OF NEW CASTLE,

Appellee-Intervenor.

Before:

KAUFMAN, *Chief Judge,*

and MOORE, FEINBERG, MANSFIELD, MULLIGAN, OAKES,
TIMBERS, GURFEIN, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

Appeal from a judgment of the United States District
Court for the Southern District of New York, Milton Pol-
lack, *Judge*, dismissing appellants' complaint. On rehearing

en banc, the Court of Appeals affirmed the dismissal on the ground that appellants lacked standing to sue.

Judgment affirmed; complaint dismissed.

RICHARD F. BELLMAN, New York, N.Y. (Lois P. Thompson, of counsel), *for Appellants*.

PAUL J. CURRAN, United States Attorney, Southern District of New York (V. Pamela Davis, Steven J. Glassman, Assistant United States Attorneys, of counsel), *for Appellees*.

GOLENBOCK AND BARELL, New York, N.Y. (Arthur M. Handler, Richard M. Resnik, of counsel), *for Intervenor-Appellee*.

MOORE, *Circuit Judge*:

Some three weeks after a divided panel of this Court reversed Judge Pollack's dismissal of appellants' complaint¹ the Supreme Court announced its decision in *Warth v. Seldin*,² a case which originated in this Circuit.³ Thereupon the federal appellees urged the reconsideration of this case *en banc*,⁴ citing both the impact of *Warth* on the earlier panel holding, and the importance of that holding to prin-

1 *Evans v. Lynn*, 376 F.Supp. 327 (SDNY 1974), *rev'd*, — F.2d — (2d Cir. 1975). At the time the earlier opinions were announced, James T. Lynn was the Secretary of Housing and Urban Development. He has been succeeded by Carla A. Hills, who now appears as appellee of record pursuant to F.R.App.P. 43(c).

2 422 U.S. 490, 95 S.Ct. 2197 (1975).

3 *Warth v. Seldin*, 495 F.2d 1187 (2d Cir., 1974). The Court's opinion, subsequently affirmed by the Supreme Court, n. 2 *supra*, was announced by Judge Hays and concurred in by Judges Moore and Timbers.

4 Appellee's petition was brought pursuant to F.R.App. P. 35(b).

ciples of standing generally. A majority of the *en banc* panel felt similarly, and a rehearing was ordered on August 11, 1975, pursuant to F.R. App. P. 35 (a). The appeal was submitted without further oral argument.

In light of the Supreme Court's opinion in *Warth v. Seldin*, *supra*, and the many recent Supreme Court decisions on the subject of "standing"—or, more accurately, the lack thereof—referred to in the dissent from the original panel's decision, — F.2d —, we now hold that the appellants lack standing to maintain this action because they have sustained no injury as a consequence of appellees' actions. Accordingly, we affirm the district court's dismissal of the complaint as to all appellees.⁵

I.

The facts, insofar as they bear on appellants' standing to sue, are substantially undisputed, and have been fully set forth in the earlier opinions and dissent. A brief summary will suffice at this point.

In 1969, the King-Greeley Sewer District ("District"), a special purpose district within the Town of New Castle ("Town") in Westchester County ("County"), sought federal aid from the Department of Housing and Urban Development ("HUD") for the construction of a sanitary sewer facility in the hamlet of Chappaqua. In 1972, the Town sought federal funds from the Department of Interior's Bureau of Outdoor Recreation ("BOR") in order to acquire Turner Swamp ("Turner") for preservation as a wildlife area and public park. Both of these grants were approved. Thereafter the Tri-State Regional Planning Council ("Tri-State"), a regional "clearinghouse" in the

5 The earlier panel's affirmance of the dismissal as to Tri-State Regional Planning Council is, of course, left undisturbed.

area for coordination and review of federal grants, declined to review the propriety of the grants.

Appellants—who do not dispute the need of Chappaqua's residents for a sewer or the desirability of preserving Turner for public recreational use—filed an action in federal district court claiming that the grants amounted to support of the Town's primarily white, single-family housing pattern in violation of the federal government's affirmative duty to eliminate discrimination and encourage fair housing opportunities in the United States.⁶ Appellants allege that they are persons "aggrieved" by the action of the federal agencies and Tri-State within the meaning of the Administrative Procedure Act, 5 U.S.C. §702, and the 1968 Civil Rights Act, 42 U.S.C. §3610(a) and (d). Standing to sue is asserted on the ground that appellants are low and moderate income individuals⁷ belonging to minority groups who have suffered, as a result of the federal agencies' "absence of meaningful civil rights enforcement",⁸ a lessening of "federal impetus"⁹ to encourage integration and fair housing in the County. Appellants make no specific allegations of damage.

Appellants do not reside in the Town. They make no claim that they have ever sought or been refused housing in the Town. They have no interest in any Town property, or connection with any past or proposed housing project in the Town. They do not allege that either of the challenged projects will discriminate against them. They make no claim that the federal funds were diverted from any actual or proposed housing project that could have been

6 Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d, and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §3601, respectively.

7 These terms are nowhere defined in appellants' briefs or memoranda.

8 Appellants' brief on rehearing at 21.

9 Ibid.

of benefit to them. In short, they allege no specific, personal, adverse results whatsoever from the grants for sewer and park construction.¹⁰

II.

The aid of the federal courts is not freely available to all who seek it. Access to the courts is restricted by judicial discretion,¹¹ regulated by statute,¹² and subject to the overriding limitation¹³ of Article III of the Constitution that the federal courts decide only cases and controversies.¹⁴ The case and controversy requirement is a jurisdictional limitation which can be enlarged neither by act of Congress nor by the courts *sua sponte*. Because it is jurisdictional in nature and Constitutional in origin, it is a "threshold requirement"¹⁵ which must be satisfied before the federal court can take cognizance of any claim. As was recently stated by the Supreme Court in *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334 (1975):

10 On the contrary, Mrs. Evans has conceded that since September, 1973, she has resided in housing which is altogether satisfactory to her.

11 See, *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 153, 154, 90 S.Ct. 827, 830 (1970).

12 Ibid.

13 *Id.*, citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250 (1911).

14 These two terms are used interchangeably; "controversy" is distinguishable from "case", if at all, in that it is generally held to embrace only civil actions. See C. Wright, *Federal Courts* §2 (1970); cf. *United States v. Nixon*, 418 U.S. 683, 696-7, 94 S.Ct. 3090, 3102 (1974).

15 In *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974) the Supreme Court dismissed petitioners' complaint on the ground that it

"failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy." 414 U.S. at 493, 94 S.Ct. at 675 (emphasis supplied).

The exercise of judicial power under Art. III of the Constitution *depends on* the existence of a case or controversy. As the Court noted in *North Carolina v. Rice*, 404 U.S. 244, 246, [92 S.Ct. 402, 404] a federal court has neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." *Its judgments must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character*, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid*, quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 [57 S.Ct. 461, 464] (1937). (Emphasis supplied).

The hallmark of a case or controversy is the presence of adverse interests between parties who have a substantial personal stake in the outcome of the litigation.¹⁶ Standing to sue, in its Constitutional sense, is the showing by a plaintiff that his particular grievance meets this standard,¹⁷

16 In the well-known cases of *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703 (1962), the Supreme Court framed the issue in the following manner:

"Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions? This is the gist of the question of standing."

See, also, *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 217-218, 94 S.Ct. 2925, 2930 (1974); *Socialist Labor Party v. Gilligan*, 406 U.S. 585, 586-7, 92 S.Ct. 1716, 1718 (1972). Cf. *Golden v. Zwickler*, 394 U.S. 104, 108, 89 S.Ct. 956, 959-960 (1969).

17 "[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150, 151-2, 90 S.Ct. 827, 829 (1970), quoting *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953 (1968).

the "essence"¹⁸ of which is the presence of "injury in fact"¹⁹ suffered by the plaintiff as a result of the defendant's actions.²⁰

Mere interest in, or concern over, a prospective defendant's acts—no matter how deeply felt—is insufficient to demonstrate injury in fact.²¹ What must be shown is a "specific and perceptible harm"²²—a "concrete injury"²³ actually suffered by the particular plaintiff,²⁴ or else clearly imminent,²⁵ which is capable of resolution and redress in the federal courts.²⁶ Abstract or hypothetical injury is not enough.²⁷

18 "[W]hatever else the 'case or controversy' requirement embodie[s], its essence is a requirement of 'injury in fact.'" *Schlesinger v. Reservists to Stop the War*, *supra* at 418 U.S. 218, 94 S.Ct. 2931, citing *Association of Data Processing Service Org., Inc. v. Camp*, *supra* at 397 U.S. 152, 90 S.Ct. 829.

19 *Ibid*.

20 See, *Flast v. Cohen*, *supra*, at 392 U.S. 102, 88 S.Ct. 1953-4; *Warth v. Seldin*, *supra*, at 422 U.S. 504-5, 95 S.Ct. 2208; *Linda R.S. v. Richard D.*, 410 U.S. 614, 618, 93 S.Ct. 1146, 1149 (1973).

21 *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368 (1972).

22 *United States v. SCRAP*, 412 U.S. 669, 689, 93 S.Ct. 2405, 2416 (1973).

23 *Schlesinger v. Reservists to Stop the War*, *supra* at 418 U.S. 222, 94 S.Ct. 2932.

24 *Sierra Club v. Morton*, *supra* at 405 U.S. 740, 92 S.Ct. 1368-9; *United States v. SCRAP*, at 412 U.S. 687, 93 S.Ct. 2415-6.

25 *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675 (1974).

26 *Preiser v. Newkirk*, *supra* at 422 U.S. 401, 95 S.Ct. 2334.

27 See, *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404 (1971), wherein the Court, quoting *Aetna Life Ins. Co. v. Haworth*, *supra* at 300 U.S. 240-1, 57 S.Ct. 464, held that:

"To be cognizable in a federal court, a suit must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would

Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. *A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action*, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally true that these allegations must be true and capable of proof at trial. *United States v. Scrap*, *supra*, at 412 U.S. 688-9, 93 S.Ct. at 2416 (emphasis supplied).

While a particular statute may confer rights upon a party, it cannot abrogate the *Constitutional* requirement that a plaintiff *in fact* suffer some injury due to a breach of the law in order to maintain an action in the federal courts.²⁸ Whether or not a plaintiff falls within the "zone of interests"²⁹ protected by the statute—whether he can, in other words, rightfully assert whatever rights are

be upon a hypothetical set of facts." (quotation marks omitted and emphasis supplied).

See, also, Schlesinger v. Reservists to Stop the War, *supra*, at 418 U.S. 221-222, 94 S.Ct. at 2932, quoting from *McCabe v. Atchison, T. & S. F. R. Co.*, 234 U.S. 151, 164, 35 S.Ct. 69 (1914); *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704 (1974); and most recently, *Rizzo v. Goode*, 44 L.W. 4095, 4098 (January 21, 1976).

- 28 *See, O'Shea v. Littleton*, *supra* at 414 U.S. 493-494, 94 S.Ct. 675; *Schlesinger v. Reservists to Stop the War*, *supra* at 418 U.S. 218, 94 S.Ct. 2931.

"We have previously noted that Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute. *But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur.*"

O'Shea v. Littleton, *supra* at 414 U.S. 493-4, n.2, 94 S.Ct. 675 (quotation mark and citations omitted; emphasis supplied).

- 29 *Association of Data Processing Service Org., Inc. v. Camp*, *supra* at 397 U.S. 153, 90 S.Ct. 830.

granted by statute—is an entirely separate inquiry from the question of whether injury has been suffered *per se*. When it rejected the notion of "legal interest" as a test for determining standing to sue, the Supreme Court held in *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 153, 90 S.Ct. 827 (1970):

The "legal interest" test goes to the merits. The question of standing is different. It concerns, *apart from the "case" or "controversy" test*, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected and regulated by the statute or constitutional guarantee in question. 397 U.S. at 153, 90 S.Ct. at 830.

Recognition of the practical need for a "zone of interests" type determination was evidenced by the Court's comment, in the same case, that "[w]here statutes are concerned, the trend is toward the *enlargement of the class of people* who may protest administrative action."³⁰ However, as Chief Justice Burger subsequently made clear, such an inquiry does not supersede or in any way encroach upon the threshold determination of injury in fact.³¹

Although we there [referring to *Association of Data Processing Service Org., Inc. v. Camp*, *supra*] noted that the categories of judicially cognizable injury were being broadened, we have more recently stressed that the broadening of *categories* "is a different matter from abandoning the requirement that the party

30 *Ibid.* (emphasis supplied)

31 *See, also, Sierra Club v. Morton*, *supra* at 405 U.S. 733 n. 5, 92 S.Ct. 1365, wherein the Court, finding that the petitioner had suffered no injury in fact, did not reach the issues concerning the "zone of interests" under the statute.

seeking review must himself have suffered an injury." *Sierra Club v. Morton*, 405 U.S. 727, 738, 31 L.Ed. 2d 636, 92 S.Ct. 1361 (1972). And, in defining the nature of that injury, we have only recently stated flatly: "Abstract injury is not enough." *O'Shea v. Littleton*, 414 U.S. 488, 494, 38 L.Ed. 2d 674, 94 S.Ct. 669 (1974). *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 218, 94 S.Ct. 2925, 2931 (1974). (citation omitted; emphasis in original).

The Constitutional limitation imposed by the case or controversy requirement has been specifically applied to the "person aggrieved" language of section 810(a), 42 U.S.C., of the Civil Rights Act of 1968, on which appellants primarily rely to support their claims of standing. In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 207, 93 S.Ct. 364 (1972), the Supreme Court held that where housing discrimination was alleged, the language of §810 (a) reflected "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."³² The petitioners' standing to sue was upheld on the express ground that

Individual injury or injury in fact to the petitioners, the ingredient found missing in Sierra Club v. Morton [supra] is alleged here. 409 U.S. at 209, 93 S.Ct. at 367 (emphasis supplied).

32 409 U.S. at 209, 93 S.Ct. at 367 (quotation marks and citation omitted; emphasis supplied). See, also, *Rizzo v. Goode*, supra at 44 L.W. 4098, wherein the Court reached a similar conclusion respecting the right to allege deprivation of civil rights under 42 U.S.C. §1983 (Civil Rights Act of 1871); and *Association of Data Processing Service Org., Inc. v. Camp*, supra at 397 U.S. 153-4, 90 S.Ct. 830, and *Sierra Club v. Morton*, supra at 405 U.S. 739, 92 S.Ct. 1368, wherein the Court held similarly respecting suits brought under Administrative Procedure Act §702.

III.

Any doubt that the appellants in this case have alleged only abstract injury which is Constitutionally insufficient to sustain their standing to sue, has been resolved by the Supreme Court's decision in *Warth v. Seldin*, supra, *Warth* involved a Constitutional challenge to the zoning practices in the suburban town of Penfield, New York. Among the petitioners were individuals who asserted standing to sue on the basis of their status as low and moderate income individuals who were members of a minority group, and were suffering from the town's exclusionary pattern of housing which preserved it as a primarily white enclave of single-family dwellings³³—the same civil rights allegations which are made by appellants in the present case.³⁴ Writing for the Court, Mr. Justice

33 *Warth v. Seldin*, supra, 422 U.S. at 492-496, 95 S.Ct. at 2203-4.

34 Appellants have pleaded the violation of a federal statute as the basis for their action and their standing to sue. However, the alleged violation exists only because the grants were purportedly made to a locality which, through the maintenance of zoning laws, has preserved itself as an allegedly affluent white suburb which is inaccessible to the appellants. Their claims of damage flow—if at all—from the Town's exclusionary practices, not from the specific grant of federal aid. This is an indirect route to the same charge made more directly in *Warth*, to wit, an alleged exclusion from housing of their choice in a more integrated neighborhood.

We note that the appellants at bar are not the only plaintiffs who have attempted indirectly to attack local housing laws by pleading the violation of federal housing law. In *Cornelius v. City of Parma*, 374 F.Supp. 730 (N.D. Ohio 1974), aff'd 521 F.2d 1401 (6th Cir. 1975), cert. denied 44 LW 3501 (March 8, 1976), five assertedly low income black individuals residing outside the city of Parma joined with two white citizens of Parma and three organizations in charging that Parma's discriminatory housing practices—specifically, local ordinances prohibiting low income housing projects absent a referendum and establishing a height limitation for buildings—violated, inter alia, the Fair Housing Act of 1968, 42 U.S.C. §3601; jurisdiction was asserted under 42 U.S.C. §3612. The district court stated that

"A fair reading of the complaint indicates that its basic thrust is directed against Parma's adoption and implementation of the

Powell reiterated the primacy of Article III's requirement of injury in fact *irrespective* of any right of action granted by statute,³⁵ and concluded that the petitioners had failed to allege such injury. Because the Court's analysis bears

ordinances previously discussed in regard to the Government's suit. It is alleged that the City's conduct, in enacting and implementing these ordinances, was aimed at setting up barriers to exclude low and moderate income blacks and other minorities from living in the City. The ordinances are said to have the further effect of maintaining the virtually all-white character and image of Parma, depriving white residents of Parma of the benefits of an integrated community, discouraging prospective builders and sponsors of low-income housing from building within the City of Parma, interfering generally with federally assisted housing programs, and excluding blacks and other minorities from equal access to jobs in the Parma area as well as equal access to educational opportunities. The plaintiffs in *Cornelius* seek as relief a declaration that the ordinances are void and of no effect, an injunction against Parma and its agents from engaging in further discriminatory housing practices and affirmative remedial action.

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"... The challenged conduct of Parma in enacting the ordinances has not as yet directly and immediately injured plaintiffs. No actual conflict has yet arisen between the rights of the low and moderate income plaintiffs and the actions of the defendants relative to these ordinances. *Indicative of the presence of abstract injury only is the fact that if the Court were to entertain this suit and on the merits declare the suspect ordinances invalid, this judicial action would not serve as the catalyst for the construction of the housing undeniably needed by plaintiffs.*" 374 F.Supp. at 733, 739 (emphasis supplied)

The district court held, as we hold here, that the asserted cause of action did not present a case or controversy. 374 F.Supp. at 739. The district court's holding was affirmed without opinion by the Court of Appeals, and *certiorari* was recently denied by the Supreme Court which apparently continues to adhere to the holding in *Warth v. Seldin*, *supra*.

35 "... Congress may grant an express right of action to persons who would be otherwise barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants."

422 U.S. at 501, 95 S.Ct. at 2206 (citation omitted; emphasis supplied).

so directly on the instant case, we quote at length from the *Warth* opinion.

... [W]e turn first to the claims of Petitioners Ortiz, Reyes, Sinkler, and Broadnax, each of whom asserts standing as a person of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group. We must assume, taking the allegations of the complaint as true, that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the *constitutional and statutory rights* of the persons excluded.

But the fact that these petitioners share attributes common to persons who may have been excluded from residence in the town is an insufficient predicate for the conclusion that petitioners themselves have been excluded, or that the respondents' assertedly illegal actions have violated their rights. Petitioners must allege and show that they *personally have been injured*, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent. Unless these petitioners can thus demonstrate the *requisite case or controversy between themselves personally and respondents*, "none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed. 2d 674 (1974). See, e.g., *Bailey v. Patterson*, 369 U.S. 31, 32-33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962).

In their complaint petitioners . . . alleged in conclusory terms that they are among the persons ex-

cluded by respondents' actions. None of them has ever resided in Penfield; each claims at least implicitly that he desires, or has desired, to do so. Each asserts, moreover, that he made some effort, at some time, to locate housing in Penfield that was at once within his means and adequate for his family's needs. Each claims that his efforts proved fruitless. We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a *substantial probability* that they would have been able to purchase or lease in Penfield *and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.* Linda R. S. v. Richard D., *supra*.

We find the record devoid of the necessary allegations. . . .

. . . .

. . . . Petitioners here rely on little more than the *remote possibility*, unsubstantiated by allegations of fact, that their situation *might* have been better had respondents acted otherwise, and *might* improve were the court to afford relief.

We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he *personally*, would benefit *in a tangible way* from the courts' intervention. Absent

the necessary allegations of *demonstrable, particularized injury*, there can be no confidence of a "real need to exercise the power of judicial review" or that relief can be framed "no [broader] than required by the precise facts to which the court's ruling would be applied." Schlesinger v. Reservists Committee to Stop the War, *supra*, 418 U.S., at 221-222, 94 S.Ct., at 2932. Warth v. Seldin, *supra*, at 422 U.S. 502-4, 507-8, 95 S.Ct. at 2207-8, 2209-10 (footnotes omitted; emphasis supplied in part; brackets in original).

The same rationale applies with equal, if not greater, force to the case at bar. Here, appellants have failed to *allege any facts whatsoever* indicative of injury suffered by them as a result of the grants to the District and the Town. They do not claim, as did the petitioners in Warth, that they unsuccessfully sought housing in the Town, or that the Town arbitrarily rejected housing proposals of benefit to them. They claim only that, had the grants not been approved, the monies *could conceivably* have gone to some other, as yet *totally imaginary* project in the County which *might* have had the result of making more housing available to them. This goes beyond even the realms of "remote possibility" which were rejected in Warth. It amounts to pure speculation and conjecture and, needless to say, it is completely inadequate to demonstrate the requisite injury under Article III.

We note that, as in Warth, the injunctive relief sought by the appellants here would not likely result in any improvement of their housing status. Indeed; since the appellants here do not allege that the grants deprived them of any actual housing opportunities—in contrast to the Warth petitioners, who claimed that they had been deprived of the benefits of at least two proposed housing developments—there is even less likelihood in this case

that an injunction restraining the federal agencies would result in any betterment of appellants' housing status in the County. The link between the ill allegedly suffered and the remedy requested is so tenuous as to approach the non-existent.

IV.

The Supreme Court has warned repeatedly in the past of the hazards in straying from the Constitutional requirement of a case or controversy.³⁶ Absent adherence to the Constitutional mandate, courts become forums for the vindication of personal values and political preferences, usurping the legislative branch as the focus for public debate and lobby, and usurping as well the executive's primary responsibility for the implementation of federal law. Federal courts cannot, consistent with the Constitution, exercise their jurisdiction to vindicate litigants' chosen causes;³⁷ *they are empowered only to grant specific relief in response to, and in order to remedy, a particularized showing of individual injury.*³⁸

This is not the time, or especially the place, to attempt a general dissertation on judicial supervision of the functioning of administrative agencies. To guard against any such danger it may be tritely said today that the draftsmen of the Constitution in 1789 were not altogether unaware of little-changing human tendencies to endeavor to seize power. The well-defined role assigned to the judiciary is to be found in Article III of that Constitution. To avoid a pos-

36 See, e.g., *North Carolina v. Rice*, *supra* at 404 U.S. 246, 92 S.Ct. 404; *Sierra Club v. Morton*, *supra* at 405 U.S. 732 n. 3, 92 S.Ct. 1365; *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 201-2 (1969); *Flast v. Cohen*, *supra* at 392 U.S. 96, 88 S.Ct. 1950; cf. *Warth v. Seldin*, *supra* at 422 U.S. 499-500, 95 S.Ct. 2205-6.

37 *United States v. SCRAP*, *supra* at 412 U.S. 687, 93 S.Ct. 2415-6.

38 *Warth v. Seldin*, *supra* at 422 U.S. 499, 95 S.Ct. 2205.

sible tendency to seek declaratory judgments or advisory opinions on matters possibly hypothetical, the role of the courts under Article III is confined to passing upon an actual "case or controversy". Even within these restricted limits the courts over the years have not suffered from want of business.

Two recent decisions of the Supreme Court would seem to illustrate the continued vitality of Article III and the reluctance of that Court to become an arbiter of all human ills. They are *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112 (1974), and *Hills v. Gautreaux*, — U.S. —, 44 LW 4480 (April 20, 1976). The Supreme Court in *Milliken* reversed the Court of Appeal's affirmance³⁹ of a multi-district desegregation order, on the grounds that the order constituted an impermissible—indeed, unconstitutional—exercise of the federal courts' equitable powers.⁴⁰

In *Gautreaux* the Court reiterated the importance of this consideration in the strongest language:

Although the *Milliken* opinion discussed the many practical problems that would be encountered in the consolidation of numerous school districts by judicial decree, the Court's decision rejecting the metropolitan area desegregation order was actually based on fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and

39 *Bradley v. Milliken*, 484 F.2d 215 (6th Cir. 1973).

40 "The view of the dissenters [who urge affirmance of the lower court's desegregation order], that the existence of a dual system in [the City of Detroit] can be made the basis of a decree requiring cross-district transportation of pupils, cannot be supported on the grounds that it represents merely the devising of a suitably flexible remedy for the violation of rights already established by our prior decisions. It can be supported only by drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent." 418 U.S. at 474, — S. Ct. at — (footnote omitted).

state government entities. That power is not plenary. It "may be exercised 'only on the basis of a constitutional violation.'" 418 U.S. at 438, quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16. See *Rizzo v. Goode*, — U.S. —, —. Once a constitutional violation is found, a federal court is required to tailor "the scope of the remedy" to fit "the nature and extent of the constitutional violation." 418 U.S. at 744; *Swann, supra*, at 16.

. . .

... [T]he *Milliken* decision was based on basic limitations on the exercise of the equity power of the federal courts. . . .

. . .

The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local government entities that were not implicated in any constitutional violation.

44 LW at 4483, 4484.

Applying these principles to the facts before it, the Court in *Gautreaux* concluded that the wrong which was properly complained of by the plaintiffs below⁴¹ was not constitutionally insufficient to support the remedy sought; appropriateness and feasibility of remedy were of crucial importance and a prerequisite to the exercise of the courts'

⁴¹ In *Milliken* the question of "standing" was not involved although the Chief Justice in his opinion must have been aware of this necessity because in a footnote he stated "the standing of the NAACP as a proper party plaintiff was not contested in the trial court and is not an issue in this case." 418 U.S. at 722, note 2.

equitable powers.⁴² The necessity for continued adherence to the Article III requirements of standing and the proper limitations on the exercise of equity powers was underscored in Mr. Chief Justice Burger's majority opinion in *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940 (1974), in which the Court held that the taxpayer plaintiff lacked standing to sue.

"As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than in any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . in short, something more than 'generalized grievances,' . . ." 418 U.S. 166, 179-80 (citations omitted).

Concurring in the holding in *Richardson*, 418 U.S. at 180, Mr. Justice Powell offered a cogent analysis of the dangers inherent in the relaxation of the historic and Constitutional restraints on judicial power; we would do well to recall his words:

Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away

⁴² In *Gautreaux* there was no question but that the plaintiffs (respondents in the Supreme Court) had standing to seek vindication of their rights and the defendants made no challenge respecting standing before the district court when they moved to dismiss the action. See *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

from a democratic form of government. I also believe that repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches. We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch. 418 U.S. 188.

• • •

[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the counter-majoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests. 418 U.S. 192.

In this action, appellants are invoking the Court's jurisdiction *solely* to impose upon the appellees priorities which

the appellants favor. Sincere as their views may be, they are not properly addressed to the courts. Disagreement with government action or policy, however strongly felt, does not, standing alone, constitute an "injury" in the Constitutional sense which is cognizable in the federal courts and susceptible of remedy by the judicial branch; it is a matter properly addressed to the Congress or the Executive.

Accordingly, the judgment of the district court is affirmed, and appellants' complaint is hereby dismissed.



MANSFIELD, *Circuit Judge* (Concurring), with whom Judge Timbers joins:

In concurring in Judge Moore's carefully considered opinion I would like to add that, sympathetic as I am to the idea of providing ready court access to those who seek enforcement of civil rights legislation, a holding that federal grants-in-aid may be attacked by persons unaffected by them would violate basic standing requirements that have repeatedly been reaffirmed and enforced by the Supreme Court in recent years. See e.g., *Warth v. Seldin*, 422 U.S. 490 (1975); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972). There is not the slightest indication in the present record that the plaintiffs will be adversely affected by the federal funding of the New Castle sewer and recreation projects or that if the funding were enjoined as demanded the plaintiffs would be benefitted. What they seek is a ban on federal funding to New Castle because it is allegedly a predominantly white, wealthy, exclusionary community, not because they would thereby gain anything. Should the relief be granted, HUD would presumably be free to use the money to aid construction of sewers and parks in San Francisco.

Thus the case differs sharply from those cited by our esteemed dissenting brothers, in each of which the plaintiffs would be benefitted by the relief sought. In *Hills v. Gautreaux*, — U.S. —, 44 U.S.L.W. 4480 (April 20, 1976), for instance, the plaintiffs, who were tenants in federally funded, racially segregated housing in predominantly black ghetto areas in Chicago, stood to benefit from the relief sought, an order which would eliminate the discrimination against them by directing that such housing, for which they had applied as tenants, must be constructed in predominantly white areas where the plaintiffs might then reside, see 296 F. Supp. at 908 (N.D. Ill. 1969). Here plaintiffs gain no comparable benefit from the injunction sought. The most they can realize is the satisfaction that federal funds will not be misused. Absent statutory authorization, this is not enough to confer standing. They must show *some* stake in the outcome. See *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

Our dissenting brothers seek to remedy this glaring deficiency by advancing a theory nowhere found in the complaint: that the grants to New Castle might have a discriminatory effect on what they choose to call a "regional housing market" that would include plaintiffs and New Castle. They also suggest that Congress, by providing that HUD's performance of its affirmative duties under Title VI (1964 Civil Rights Act), 42 U.S.C. §2000d, and Title VIII (Fair Housing Act of 1968), 42 U.S.C. §3601, et seq., would be subject to judicial review, intended to give standing to citizens in the position of the plaintiffs here. However, no such authority to sue is to be found in these statutes. Title VI, 42 U.S.C. §2000d-1, obligates HUD to terminate funds "to the particular program, or part thereof, in which such [discrimination] has been so found" but since this case does not involve an attack upon particularized discrimination plaintiffs can-

not use 42 U.S.C. §2000d-2 for judicial review. Title VIII, 42 U.S.C. §3608, obligates HUD to administer programs in a manner affirmatively to further the purposes of the Act, but there is no indication, express or implied, that Congress intended to give private persons the right to sue HUD for non-compliance with this duty. On the contrary, 42 U.S.C. §3612, which authorizes enforcement of certain provisions of the Fair Housing Act (§§3603 through 3606) by private civil action, omits §3608, the section outlining HUD's general duties, which is allegedly violated here by HUD. Title 42 U.S.C. §3610 is limited to suits against private persons alleged to have violated the Act, which may be brought only after voluntary compliance proceedings before the Secretary of HUD have failed. Surely if Congress had intended judicial review of HUD's alleged maladministration of the Act, it would not have excluded §3608 from those sections that might be enforced by private action.

Thus the dissents' suggestion that Congress intended to confer such authority upon private litigants is but an example of the wish becoming the father of the thought. When Congress desires to authorize citizen suits for the enforcement of laws of widespread public interest, it knows how to do so, as it vividly demonstrated in its enactment of §304(a)(1) of the Clean Air Act, 42 U.S.C. §1857h-2 and §505 of the Water Pollution Control Act, 33 U.S.C. §1365. Here it has not yet taken such action.

OAKES, *Circuit Judge* (dissenting) (with whom Chief Judge Kaufman and Judges Feinberg and Gurfein concur):

In this suit, residents of lower-income, predominantly black housing areas in Westchester County, New York, have alleged that federal grants have been improperly awarded

to the Town of New Castle, a wealthy, predominantly white community also located in Westchester County. The challenged awards were made to the Town of New Castle by the United States Department of the Interior and the United States Department of Housing and Urban Development. The purpose of the awards was to assist New Castle in the development of Town parkland and the construction of a sewer system. The appellants claim that the two federal departments have statutory obligations, under Title VI of the Civil Rights Act of 1964 and Title VIII of the Civil Rights Act of 1968,¹ 42 U.S.C. §§ 2000d *et seq.*, 3601 *et seq.*, to refuse to make grants which are inconsistent in design or effect with nondiscriminatory, fair housing objectives. Their claim is that the two grants to New Castle are inconsistent with fair housing goals because the grants tend to support and perpetuate patterns of economically and racially discriminatory housing in Westchester County. The complaint is that the federal courts have the responsibility under the Civil Rights Acts to review and strike down grants made by federal departments which have failed to consider the implications of the grants in respect to attainment of the goal of nondiscriminatory, fair housing.²

¹ 42 U.S.C. § 2000d provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 3601 provides:

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

² The Tri-State Regional Planning Commission (Tri-State) was an original defendant but dismissed as such by the majority of the panel, a decision which is not sought to be reversed by the court en banc. Tri-State's duties are relevant, however, to the question to be discussed *infra* regarding the scope of the federal affirmative duty to assure that federal grants are not made for discriminatory purposes or with discriminatory effects. Tri-State is an interstate body, both corporate

The majority of the court, however, has held that appellants are not sufficiently "aggrieved" or "injured in fact" by the grant of federal funds to New Castle to have "standing" to attack the awards. This holding is made despite the fact that appellants are the very persons who, by their own allegations, will continue to suffer from the racially restricted housing environment in Westchester County which is allegedly perpetuated by the challenged federal action. Since it is exactly this sort of third-party injury which Congress, in 42 U.S.C. § 2000d-2,³ must have meant to provide relief for when it established judicial review of federal grants, and in view of the precedents in both this and other courts upholding standing for challenges to federal grants in similar cases, *see Jones v. Tully*, 378 F. Supp. 286, 287 & n.1 (E.D.N.Y. 1974), *aff'd per curiam sub nom. Jones v. Meade*, 510 F.2d 961 (2d Cir. 1975); *Southern Christian Leadership Conference, Inc. v. Connolly*, 331 F. Supp. 940, 942-44 (E.D. Mich. 1971). I must respectfully dissent.

and politic, serving as a common agency of Connecticut, New Jersey and New York. Created by compact, it has been designated under Circular A-95, promulgated by the Office of Management and Budget, as the areawide clearinghouse for review of applications for federal aid to assure conformance with regional comprehensive plans, to implement the Demonstration Cities and Metropolitan Development Program Act, 42 U.S.C. § 3301 *et seq.*, and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231. *See* 38 Fed. Reg. 228 (1973). The latter commands consideration of impact of the proposed program upon housing and human resources development. 42 U.S.C. § 4231(e). The A-95 Circular specifically calls for comment on the "civil rights aspect of the project," ¶ 3(d), and "[t]he extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." ¶ 5(d).

³ 42 U.S.C. § 2000d-2 provides in pertinent part:

Any department or agency action taken pursuant to section 2000d-1 of this title [*see note 6 infra*] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds

Appellants' complaint, briefly recapitulated, states that appellants are low-income minority (black) residents of Westchester County who live in what the district court called "ghetto living conditions," that is, in racially concentrated low-income neighborhoods, which the district court postulated "are a very real and very serious 'injury' . . ." *Evans v. Lynn*, 376 F.Supp. 327, 332 (S.D.N.Y. 1974). The complaint alleges that the Town of New Castle, to or for whose benefit the challenged grants were made, is, in the words of the district court, "predominantly white [98.7 per cent] and a well-to-do enclave." *Id.* at 330. It is further alleged that 90 per cent of New Castle's land is zoned for single-family, residential development on parcels of more than one acre, that there are currently 7,000 vacant acres and that the median value of single-family homes in 1970 was in excess of \$50,000.⁴ Appellants quite directly complain that New Castle's zoning ordinance has the purpose and effect of excluding blacks and other racial minorities from living in the Town. Finally, it is alleged that the federal agencies in question approved the grants⁵ without

4 The district court also found that "New Castle continues to be resistant to attempts to alter its present housing character." 376 F. Supp. at 330. The town, it found, had "successfully thwarted" the attempt of the New York State Urban Development Corporation to "construct a small 100-unit, low-cost housing facility in the town." *Id.* The Town's master plan sets as a goal "maintaining New Castle as a single-family residential community." It also provides in reference to sanitary sewer development that "the provision or extension of water and sewers in low [density] residential areas shall not . . . be considered as a basis for rezoning to higher residential density."

5 The grant of matching funds for the sewer was made under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102, and the grant for the acquisition of Turner Swamp was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. § 4601.

The sewer grant was made by HUD to the King-Greely sewer district in the Chappaqua section of town. The Town of New Castle is, nonetheless, the effective grantee of the benefits of the grant. The recrea-

performing the affirmative duties required of them by Title VI and Title VIII.⁶ A consideration of the law of standing

tion grant was made by the Bureau of Outdoor Recreation of the Department of the Interior directly to the Town of New Castle.

The HUD "rating sheet" for the preliminary application for the sewer grant here does carry some points for, *e.g.*, the "Percent of housing in project area that will be accessible on a nondiscriminatory basis to families and individuals with low and moderate incomes," but there appears to be no evaluation of the overall residential segregation policies of the community. It is a matter of defense on the merits, which are not reached, whether the agencies in fact performed their affirmative duties. For our purposes it is enough if a viable claim of nonperformance is made.

The BOR grant was allegedly made without any reference to civil rights enforcement procedures or any Title VIII obligations, though a Title VI compliance form was attached to the application, signed by the Town Supervisor.

6 The affirmative duties, following the policies set forth in note 1 *supra*, are respectively imposed by 42 U.S.C. § 2000d-1 (Title VI) and 42 U.S.C. §§ 3608(c), (d)(5) (Title VIII). The former provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to

as it relates to this case must assume that all of these facts as alleged are true.^{6a} It at least has to take them into

comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 3608 provides in part:

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

See generally as to Title VIII, the panel opinion, *Evans v. Lynn*, No. 74-1793 (2d Cir. June 2, 1975), slip op. 3885, 3893 n.10.

6a It is possible, of course, that the "pinpoint provision" in 42 U.S.C. § 2000d-1 may provide a defense on the merits under this section. Under that provision, compliance with nondiscrimination requirements may be obtained by agency

refusal to grant . . . assistance . . . to any recipient as to whom there has been an express finding . . . of a failure to comply with such requirement, but such refusal shall be limited to the particular political entity . . . and, shall be limited in its effect to the particular program . . . in which such noncompliance has been so found. . . .

42 U.S.C. § 2000d-1 (emphasis supplied). Judge Mansfield, in his concurrence, argues that no discrimination could be "found" in the particular grants involved in this case and, therefore, the appellants have no right to overturn these grants under the review provision in 42 U.S.C. § 2000d-2. Surely the question of what findings can properly be made in this case raises issues going far into the merits of appellants' claim and, therefore, should not be decided prematurely at the present appeal which concerns only the subject of appellants' standing to raise the claim. Nonetheless, I feel it appropriate to indicate that the matter is far more complex than Judge Mansfield suggests.

On the pleadings of this case, which allege that New Castle has pursued zoning and housing policies with the purpose and effect of

account which, I regret to say, the majority opinion does not.

Fundamental to analysis under the law of standing, in view of the vague generalities oftentimes employed to decide particular cases,⁷ is a differentiation between the two important functions the doctrine performs: the first is determining whether the plaintiff is a proper party to

excluding blacks and other racial minorities from living in the town, there can be little doubt that the Town is in violation of the nondiscrimination requirements adopted pursuant to 42 U.S.C. § 2000d-1 by HUD, see 24 C.F.R. § 1.1 *et seq.*, and Interior, see 43 C.F.R. § 17.1 *et seq.* The question as to the applicability of the "pinpoint provisions" in this case therefore turns on whether the sewer and park grants to the Town are programs "in which such noncompliance has been so found. . . ." Judge Mansfield would consider "noncompliance" to have been "found" in the sewer and park grants only if the particular programs were being administered on a visibly discriminatory basis, e.g., by prohibiting minorities from using the parks and sewers of New Castle. This strikes me as an unduly restrictive reading of the limitation. Where a particular grant is used as one step in furtherance of a discriminatory scheme, the fact that the administration of the grant is facially neutral should not foreclose a finding that the grant is in implicit, if veiled, noncompliance with the nondiscrimination requirements. Here appellants claim that ostensibly neutral grants (sewer and park grants) directly assist a political entity (New Castle) to attain its discriminatory scheme (by foreclosing opportunities for low-income housing development in New Castle, see text at notes 13 & 14, *infra*). It is totally unrealistic to suppose that federal grants in aid to local communities for sewage or recreation/wildlife areas, or for that matter water systems, do not exert a significant leverage on the location and type of housing, or, where made to communities with exclusionary policies, the perpetuation of those policies. See C. Haar & D. Iatridis, *Housing the Poor in Suburbia* 338 (1974). HUD's own rating sheets relative to these grants constitute an administrative construction of the statute contrary to that espoused by Judge Mansfield. This construction is entitled to substantial weight under *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), and *Udall v. Tallman*, 350 U.S. 1, 16 (1965). A district court, after a full hearing, could properly "find" the grant to be discriminatory in both design and effect and therefore not in compliance with the statutory requirements.

7 See 3 K. Davis, *Administrative Law Treatise* § 22.18 (1958); *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 151 (1970).

request an adjudication of the particular issue, see *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968); the second is determining whether as a matter of policymaking responsibility the particular issue is suitable for determination by the courts, *Barlow v. Collins*, 397 U.S. 159, 169 n.2 (1970) (Brennan, J., concurring in the result). The first of these has been called "access standing" and the second can best be called "decision standing," although the latter often goes by the broad terms "justiciability" or "reviewability" and although it often subsumes a number of other doctrines or techniques which are used by the courts when as a matter of policy it is thought desirable to avoid decisions on the merits.⁸ See Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645 (1973), cited by Mr. Justice Powell in *Warth v. Seldin*, 422 U.S. 490, 500 n.11 (1975). Cf. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 156 (2d ed. 1973). The Court's present analysis directs us first to examine the question "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v. Carr*, 369 U.S. 186, 204 (1962)." *Warth v. Seldin*, *supra*, 422 U.S. at 498-99. This is in essence the question of access standing.

Have the appellants alleged such a personal stake in the outcome of *this* controversy? In this connection it must be remembered that the controversy sought to be determined is *not*, as in *Warth v. Seldin*, *supra*, whether a town

⁸ Compare Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 Harv. L. Rev. 40 (1961), with Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959), and Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

in which the plaintiffs are not resident may exclude persons of low and moderate income by its zoning laws. Rather, on the allegations, the question brought in this case is whether federal agencies administering grants-in-aid may approve grants to "activities" (the Town of New Castle) whose practices (exclusionary zoning) have the purpose and effect of subjecting blacks and other racial minorities to discrimination by excluding them from residence within the Town's borders. 42 U.S.C. § 2000d; see also 42 U.S.C. § 3608.⁹ If minorities are "denied the benefits" of such grants because of the discriminatory access limitations of Town zoning policies, 42 U.S.C. § 2000d indicates that the grants should not be made, and 42 U.S.C. § 2000d-2 provides for judicial review to enforce that law. Accordingly, *Warth v. Seldin*, so heavily relied on by the majority opinion, is sharply distinguishable from the pres-

⁹ See notes 1 and 6 *supra*. That the affirmative duties imposed were intended by Congress to be meaningful is evidenced, e.g., by the remarks of Senator Mondale in connection with the 1968 Civil Rights Act, relied upon in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). He referred to the

sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the American city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong. Rec. 2278 (1968). So, too, Representative Celler said: "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos . . ." 114 Cong. Rec. 9563 (1968). See U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia* 67-70 (1974).

ent case. Indeed, it is helpful to appellants. In *Warth* the Court was extremely careful to point out not only that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . ,'"¹⁰ but also that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules."¹¹ *Warth* itself involved no such statutes; here the statutory claim is the essence of appellants' case. In *Warth*, the parties denied standing had failed to show how the specific town practices which they challenged (zoning laws) had resulted in the type of particularized injury required to obtain standing to litigate a generalized constitutional challenge to government action. 422 U.S. at 508. See *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221-22 (1974); *United States v. Richardson*, 418 U.S. 166, 177, 179-80 (1974). In the instant case, as

10 422 U.S. at 500, citing *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

11 422 U.S. at 501. The "prudential rules" to which Justice Powell refers include the rule that "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens . . . normally does not warrant exercise of jurisdiction." *Id.* at 499, citing *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166, 188-97 (1974) (Powell, J., concurring). Similarly, a plaintiff "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975), citing *Tilston v. Ullman*, 318 U.S. 44 (1943). At the same time, an attenuated injury suffered in common with many others may still be enough to establish standing. *United States v. SCRAP*, 412 U.S. 669 (1973). See also Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 Harv. L. Rev. 645, 681 (1973); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1730 (1975). Professor Scott concludes that, by virtue of the costs of litigation, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom." 86 Harv. L. Rev. at 674. One would suppose this was all the more true in the light of *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

shall be shown below, the connection between the challenged action (federal grant) and the injury claimed (perpetuation of racially restricted housing environment in Westchester County) is amply direct, under the controlling cases, to supply standing for appellants to seek statutory review of the government action. See, e.g., *United States v. SCRAP*, 412 U.S. 669 (1973); *Barlow v. Collins*, 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

The majority opinion, with all due respect, misses the point of this law suit when it emphasizes that appellants "do not claim" that they unsuccessfully sought housing in the Town of New Castle or "that the Town arbitrarily rejected housing proposals of benefit to them."¹² The opinion also misapprehends their claim when it states it as saying that "had the grants not been approved, the monies *could conceivably* have gone to some other, as yet totally imaginary project in the County which *might* have had the result of making more housing available to them." [Maj. op. 6773.] Rather, appellants' claim is that the federal departments violated affirmative action requirements of the Civil Rights Acts by making grants to municipalities without evaluating the economic and racial consequence of their housing and development practices, with the effect of maintaining racial residential segregation in Westchester County, further constraining them to continued residence in the county's ghettos.

In cases decided in several circuits, including our own, courts have found that persons who live in concentrated,

12 It is not precisely correct that the Town did not arbitrarily reject housing proposals that might have been of benefit to appellants. See note 4 *supra*. But this is not the gist of appellants' claim. It goes without saying, as the panel opinion pointed out, slip op. 3885, 3890 n.6, that there is no claim that the sewer or park projects will be operated discriminatorily, but that is not what this suit concerns, either.

segregated, low-income housing areas have standing under 42 U.S.C. § 2000d-2 to challenge federal grants which have the effect of increasing the concentration of low-income housing in their portion of the regional housing market. In *Jones v. Meade, supra*, this court, in a per curiam opinion, upheld standing for "several individuals who reside in Spinney Hill" (a low-income predominantly black portion of the Town of North Hempstead, New York) to challenge a federal grant for a low-income housing project in the Spinney Hill area because the grant would tend to "perpetuate racial concentration in the Spinney Hill area in violation of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d" *Jones v. Tully, supra*, 378 F. Supp. at 287, *aff'd per curiam sub nom. Jones v. Meade, supra*. See also *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part on other grounds*, 473 F.2d 910 (6th Cir. 1973); *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969), *aff'd*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971). Cf. *Shannon v. United States Department of Housing & Urban Development*, 436 F.2d 809, 812, 817-18 (3d Cir. 1970). The claim that the federal grants will have the effect of perpetuating racially segregated housing conditions in the plaintiffs' housing market is precisely the argument made against these federal awards by the appellants in this case. The reasoning which supports their claim may be traced as follows:

1. Patterns of racially segregated housing are perpetuated either by building low-income housing in low-income areas (as in *Jones v. Tully*) or by building high-income housing in high-income areas of the same housing market.¹³ This is because, in either case, the

¹³ An initial predicate of this argument, of course, is that New Castle and lower Westchester County are not different housing markets but

construction decision forecloses opportunities for integration of housing facilities throughout the regional housing market.¹⁴

2. A federal grant to a high-income area which is consistent with increased development of high-income housing but which is inconsistent with development of low-income housing in that area tends to perpetuate patterns of racially segregated housing.

are part of a larger market of which the entire Westchester County is but a sub-market. Certainly plaintiffs in a low-income black housing area in, say, Cincinnati would not have standing, under this rationale, to challenge grants made to New Castle. This requirement that the challenging parties be within the same housing market as the grantee Town, however, is undisputably fulfilled in the present case; Tri-State's participation in approval of the grants, note 2 *supra*, is clearcut evidence of this.

The decision of the United States Supreme Court in *Hills v. Gautreaux*, 44 U.S.L.W. 4480 (U.S. Apr. 20, 1976), while dealing with the remedy for HUD's violation of its constitutional and statutory duties in respect to the selection of public housing sites and assignment of tenants, emphasized the metropolitan area relationship in respect to housing market opportunities. As the Court there said, with the greatest of materiality to appellants' claims here, "The relevant geographic area for purposes of the respondents' housing options is the Chicago [substitute Westchester County] housing market, not the Chicago city limits [substitute the boundaries of the Westchester County town or city within which they reside]." 44 U.S.L.W. at 4485. It is interesting that in *Hills v. Gautreaux*, the "more substantial question" was said to be "whether an order against HUD affecting its conduct beyond Chicago's boundaries would impermissibly interfere with local governments and suburban housing authorities that have not been implicated in HUD's conduct." *Id.* Here, the alleged improper conduct of HUD relates to grants to local authorities that have been implicated in alleged exclusionary zoning.

¹⁴ It should be noted that this foreclosure effect is a direct, immediate consequence of the grant. Cf. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). This consequence, moreover, would be eliminated by a simple reversal of the decision to make the grant. Amelioration of the injury complained of its not, therefore, as in *Warth v. Seldin*, 422 U.S. 490 (1975), one contingent on the future economic decisions of independent third persons. See *id.* at 505.

3. The federal parkland and sewer grants challenged in this case are consistent with and promote development of high-income housing in New Castle, but are inconsistent with and negate development of low-cost, high-density housing in that area.

4. The sewer grant is inconsistent with construction of high-density, low-cost housing in New Castle because, as is stated in an affidavit attached to the complaint, the sewer system planned by New Castle "will have the capacity to handle the needs of the area only if the area is developed at low densities. . . ." Affidavit of Paul Davidoff, Director of Suburban Action Institute, formerly Associate Professor of Urban Planning at the University of Pennsylvania. Mr. Davidoff's affidavit charged that HUD review of the sewer grant had wholly ignored the role which sewer systems play in shaping the parameters of future community development, and the impact of that development on low and moderate income housing opportunities within the region.

5. The parkland grant may also be inconsistent with development of low-income housing in New Castle because different park facilities (including sizes of open areas and walkways, numbers of, and therefore location of, playing fields, landscaping design, etc.) would be demanded for a high-density housing area than for a low-density area.¹⁵

¹⁵ Appellants do not claim that the parkland should, or could, be developed for housing rather than for recreation. Their complaint must, therefore, be read as alleging the inconsistency of the proposed parkland development with the type of recreational demand which high density housing would create. There is nothing in the record to permit summary judgment against appellants on this point.

The claim of the pleadings that the appellants are "injured in fact" because the federal grants tend to perpetuate economically and racially discriminatory housing in Westchester County, I must insist, represents "something more than an ingenious academic exercise in the conceivable." *United States v. SCRAP*, *supra*, 412 U.S. at 688. The fair sense of appellant's claim is that they have been or "will in fact be perceptibly harmed by the challenged agency action." *Id.* As the findings of the district court indicate, the harm appellants will suffer from a perpetuation of the conditions of segregative housing in which they presently live constitutes a "very real and very serious injury." 376 F. Supp. at 332. Government actions which allegedly perpetuate (if not exacerbate) the injurious condition of segregative housing seem quite plainly to effect an injury-in-fact to the precise type of interest which Congress intended to protect when it enacted Titles VI and VIII of the Civil Rights Act. The apparent thrust of those Titles is to assure that federal grants are consistent with the objectives of nondiscriminatory, fair housing. However, the two federal departments, charged by Congress with the duty of affirmative action to encourage fair housing, economically viable communities, and the breakdown of segregated residential housing, are, if appellants' supporting evidence is to be believed,¹⁶ giving priority to parks and sewers for the privileged com-

¹⁶ Robert Mendoza, the HUD official who prepared the rating sheet for the sewer grant, testified that he never reviewed the housing and land-use policies of an applicant community. He "reconstructed" the rating sheet since there was none in the file presented to the district court, but on the "reconstruction," it is claimed, he gave points to New Castle improperly (because of its wealth) so that the application should never have been approved. Howard A. Glickstein, former staff director of the U.S. Commission on Civil Rights, pointed out that HUD had consistently "devoted itself to processing individual complaints of housing discrimination to the exclusion of all other responsibilities under the act." BOR has been, appellants aver, equally delinquent.

munities without regard to the needs for regional development and integration of low-cost housing opportunities.

I think it important, in evaluating the sufficiency of appellants' claims of injury, to note that the plaint of appellants in their county, which is part of Greater New York, finds its echo in many other American localities, many of which are cities and have, to say the least, vast problems in the way of finances, municipal services and quality of life. If federal grant procedures are as appellants allege, they are exacerbating these problems, to appellants' individual disadvantage (and that of many American cities) by enhancing the quality of life in already privileged communities wholly without consideration of the housing needs of those trapped in low-income, segregated housing areas only a few miles away.¹⁷

Appellants are what Norman Williams has aptly called the "third party non-beneficiaries" of exclusionary land use controls and policies.¹⁸ Their challenge to federal policies or practices which can be said to perpetuate "power to the people who got there first"¹⁹ in their specific area is based on federal statutes. The appellants allege that the grants were made for the sole benefit of a discriminatory grantee, the Town. They have alleged that the effect of the grants is to injure appellants by perpetuating the racially restrictive housing conditions in which they currently live. Accordingly, appellants have stated both a cause for relief and standing under 42 U.S.C. § 2000d-2. Only at trial will it

17 See Editorial, *City vs. Suburbia*, N.Y. Times, Nov. 30, 1975.

18 Williams, *The Strategy on Exclusionary Zoning: Toward What Rationale and What Remedy?*, 1972 Land Use Controls Annual 177.

19 See "Housing Programs for Poor Can't Break Into the Suburbs," N.Y. Times News Service, Rutland (Vt.) Daily Herald, Nov. 12, 1975, at 6, quoting Herbert Franklin of Potomac Institute, Inc.

become necessary for appellants to prove the truth of the facts alleged. *United States v. SCRAP*, *supra*, 412 U.S. at 689. In short, under the controlling precedents in this area, appellants have access standing. See *Investment Company Institute v. Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc. v. Camp*, 400 U.S. 45 (1970) (per curiam); *Barlow v. Collins* *supra*; *Association of Data Processing v. Camp*, *supra*.²⁰

The second or "reviewability" aspect of the standing question involves additional judge-made policymaking considerations. They are what Mr. Justice Powell has referred to as "essentially matters of judicial self-governance." *Warth v. Seldin*, *supra*, 422 U.S. at 500. Even assuming there is access standing on the part of appellants, is the issue of the propriety of the HUD or Interior Department grants to New Castle an "abstract questio[n] of wide public significance . . . [which] other governmental institutions may be more competent to address"? *Id.* Should the court decline standing as a matter of policy? ²¹ A powerful argument can be made that the court should not act as a "plan-

20 As the Supreme Court said analogously in *Traffante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972), with respect to the legislative history of Title VIII:

Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which, the Solicitor General says, the complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." The role of "private attorneys general" is not uncommon in modern legislative programs. See *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402; *Allen v. State Board of Elections*, 393 U.S. 544, 556; *Perkins v. Matthews*, 400 U.S. 379, 396; *J.I. Case Co. v. Borak*, 377 U.S. 426, 432.

21 Mr. Justice Brennan in *Barlow v. Collins*, 397 U.S. 159, 178 (1970) (concurring opinion), and Scott, *supra* note 11, at 684, believe standing narrowly and properly should refer to what the latter has called "access standing." See also K. Davis, *Administrative Law Treatise* §22.00-.04, at 723 (Supp. 1970).

ning agency"²² or as a "congressional inquiry" to correct an Executive Department which has refused to carry out a congressional mandate, especially where the suit might be unmanageable.²³ The Supreme Court decision in *Train v. City of New York*, 420 U.S. 35 (1975) (agency may not impound water pollution control act appropriations), indicates quite plainly, however, that the courts should not fail in their duty to assure that the Executive has faithfully executed the laws merely because a complex regulatory scheme is involved. See also *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974) (federal court may grant declaratory relief ordering Executive to implement federal employees' pay adjustment). Other courts, including our own, have corrected errors in the Executive's administration of congressionally established programs in a multiplicity of cases where, arguably, the alleged damage to the plaintiff has been less or no more direct, where their alleged material interests have been less or no more affected, and where the alleged agency action or inaction has been less or no more egregious than here.²⁴

²² Professor Stewart has used this term in reasoning against wholly unlimited access standing. See Stewart, *supra* note 11, at 1737.

²³ Unmanageability might exist here if the general policy of HUD grant-making, as opposed to the specific grants to New Castle, had been the subject of the appellants' claim. But see *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc) (challenge to HEW school desegregation policies generally).

²⁴ E.g., *Schlafly v. Volpe*, 495 F.2d 273 (7th Cir. 1974) (persons complaining of cessation of highway construction funded by federal gas tax, on basis they would benefit from use of highways); *Davis v. Romney*, 490 F.2d 1360 (3d Cir. 1974) (buyers of FHA-insured homes challenging failure to require obedience to local housing codes); *Bradley v. Weinberger*, 483 F.2d 410, 413-14 n.1 (1st Cir. 1973) (patients and doctor challenging labeling requirements as too strenuous); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (en banc) (black students, citizens and taxpayers challenging HEW failure to enforce 10 state operated and numerous other school district desegregation plans); *City*

The courts have taken the view that agency disregard of congressional mandate is challengeable by persons affected adversely because it involves, it does not negate, deference to another branch of the Government. As Mr. Justice Powell, concurring in *United States v. Richardson*, *supra*, pointed out:

The doctrine of standing has always reflected prudential as well as constitutional limitations. . . . Whatever may have been the Court's initial perception of the intent of the Framers . . . it is now settled that such rules of self-restraint are not required by Art. III but are "judicially created overlays that Congress may strip away" . . . But where Congress does so, my objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom."

418 U.S. at 196 n.18.²⁵ If there were any doubt that this concept is the law of the Court,²⁶ that doubt was removed by *Warth v. Seldin*. There, speaking through Mr. Justice Powell, the Court held:

of Inglewood v. City of Los Angeles, 451 F.2d 948 (9th Cir. 1972) (adjacent city affected by noise from federally financed airport); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) (persons displaced by urban renewal); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) (representatives of "aesthetic, conservation and recreation" interests not resident of the town where the project was to be located). See also *Eastern Kentucky Welfare Rights Org. v. Shultz*, 370 F. Supp. 325 (D.D.C. 1973) (welfare organization challenging IRS regulation permitting charitable exemption status to hospitals which do not provide for free care for indigents).

²⁵ See also *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring).

²⁶ Its logic was questioned in Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1380-83 (1973).

Moreover, Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. *E.g.*, *United States v. SCRAP*, 412 U.S. 669 (1973). But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. *E.g.*, *Sierra Club v. Morton* [405 U.S. 727, 737 (1972)]; *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 (1940).

422 U.S. at 501.

... Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute. *Linda R. S. v. Richard D.* [410 U.S. 614, 617 n.3 (1973)], citing *Trafficante v. Metropolitan Life Ins. Co.* [409 U.S. 205, 212 (1972)], (White, J., concurring).

422 U.S. at 514.

The question remains, of course, whether in this case "Congress has granted a right of action." As discussed above, the plain intentment of Title VI if not Title VIII is to provide for review of federal grants to assure their consistency with federal anti-discrimination and fair housing objectives. *See, e.g.*, *Jones v. Tully*, *supra*; note 3 *supra*. Since it is unlikely that either the federal depart-

ments or the grant recipients would have any interest in challenging the grants themselves, Congress must have meant to provide for review at the instance of persons "adversely affected" or "aggrieved by" improper grants. The implied right of review for these persons is at least as clear and as significant as in cases such as *Data Processing, Barlow, Arnold Tours and Investment Company Institute*. *Cf. Warth v. Seldin*, *supra*, 421 U.S. at 501.²⁷

What the courts are asked to do here, to require the agencies to reevaluate the grant approvals in the light of the nondiscriminatory, fair-housing mandate,²⁸ is well within the traditional role of judicial review of agency action. No better authority may be referred to than our own *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), the landmark case that ultimately furnished the basis for National Environmental Protection Act²⁹ review of project alternatives. It is too obvious to require citation that it is well within the traditional model of judicial review that an agency be required to review an action, involving an expenditure of public funds for purely private or local

27 As is suggested in Judge Mansfield's concurrence, the argument may be made that Congress did not intend to give private persons the right to sue HUD for noncompliance with its duty of affirmative action, because 42 U.S.C. § 3610 specifically authorizes enforcement of the Act against private persons and omits mention of § 3308, note 1 *supra*, which sets forth HUD's affirmative duties. We are unconvinced, however, that this narrow reading of reviewability under the civil rights statute is appropriate. *Cf. National Welfare Rights Org. v. Finch*, 429 F.2d 725 (D.C. Cir. 1970) (private standing exists to challenge HEW ruling that state welfare laws conform to federal standards even though only review of HEW decision by states is expressly provided for by statute). *See also* Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702(a), and *Stewart*, *supra* note 11, at 1726 n.285.

28 Appellants seek injunctive relief, but this would be purely ancillary to the reevaluation sought.

29 42 U.S.C. § 4332(2)(C)(iii).

advantage, to assure that statutory guidelines have been adhered to.

This is not an issue of constitutional involvement as in *Schlesinger v. Reservists Committee to Stop the War*, *supra* (Article I, § 6 prohibition by members of Congress asserted), or in *United States v. Richardson*, *supra* (Article I, § 9 violation through CIA appropriation asserted). See *The Supreme Court*, 1973 Term, 88 Harv. L. Rev. 41, 240-43 (1974). In such a case, to resolve the matter judicially may, as has been pointed out,³⁰ remove the particular issue altogether from the political process, a danger which Mr. Justice Frankfurter and other before and after him have warned against in the course of treating the overall subject of judicial review. Here, however, the Congress has spoken, and judicial resolution of the controversy forecloses neither congressional nor executive action. The political processes would not be imposed upon, much less invaded, by the exercise of Article III power here concerned. In any case, assuming that our system of representative democracy makes the legislature the primary as well as the initial forum for resolving conflicting social and economic interests, if the Congress has spoken and the Executive has not heard the message, the judiciary's role in resolving the controversy is hardly a usurpation of power or an infringement of prerogatives.

One can hardly quarrel with the majority statement of abstract propositions, as they well set forth the rubric of the law of standing. One may regret the majority's application of those rules to this case, one very different, as I see it, from that which the majority perceives.

³⁰ See Stewart, *supra* note 11, at 1741.

KAUFMAN, *Chief Judge* (dissenting) (with whom Judge Gurfein concurs):

In concur fully in my brother Oakes's scholarly opinion. I should like, however, to add the following thoughts.

Constitutional provisions, such as the "case or controversy" requirement of Article III, are not magic talismans, whose import is as immutable as the law of ancient Media and Persia. Rather, the words of the Constitution to a large extent derive their meaning from the perceived needs, desires and expectations of society.

It is legitimate—and, indeed, desirable—to view constitutional commandments, such as the standing requirement, as flexible and evolving over time.¹ The proper approach may best be shown by very briefly reviewing the courts' construction of other constitutional provisions, where this process is more obvious. The First Amendment guarantee of freedom of religion, for example, was, when drafted in 1789, almost certainly intended to refer exclusively to the worship of God.² But today the concept of religion has

¹ The words of Chief Justice Warren, referring to the Eighth Amendment in *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958), are informative:

[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

² This may be seen by examination of various colonial documents advocating religious freedom. The 1772 *Rights of the Colonists*, for example, espoused freedom of religion because of its concern with "various attempts which have been made and are now making, to establish an American Episcopate." *The Bill of Rights: A Documentary History* of 210 (Chelsea House, 1971). And the first document to protect freedom of religion, the Maryland Toleration Act of 1649, declared that it dealt with "matters concerning Religion and the honor of God" and granted freedom only to those "professing to beleive [sic] in Jesus Christ." *Id.* at 91, 93 (emphasis added). Of perhaps even greater significance, the Senate eliminated the words "nor shall the rights of conscience be infringed" from the First Amendment. *Id.* at 1146.

been expanded to protect, under some circumstances at least, not only the worship of a divinity or the refusal to recognize a divinity, but also some, if not all, deeply held moral convictions.³ Similarly, the First Amendment meaning of "speech" has come to include silent protest.⁴ And the definition of "search", as used in the Fourth Amendment, has in recent years been expanded beyond the physical intrusion which concerned the Framers,⁵ to encompass electronic eavesdropping.⁶

This expansive reading of the provisions of the Bill of Rights may plausibly be viewed as a process—which some argue has not reached its limit—by which courts have extended the protection accorded individual autonomy.⁷ A similar process may be discerned in the interpretation of the shibboleths of standing: "case or controversy", and its corollary, "injury in fact". The past decade has seen a dramatic lowering of the barriers imposed by standing requirements to challenges to administrative action. Perhaps not by change, this movement toward broader standing has coincided with a spectacular increase in the size,

³ See, e.g., *U.S. v. Seeger*, 380 U.S. 163 (1965); *Welsh v. U.S.*, 398 U.S. 333 (1970); *U.S. v. Sisson*, 297 F.Supp. 902 (D.Mass. 1969) (Wyzanski, J.), appeal dismissed for want of jurisdiction, 399 U.S. 267 (1970). Although *Seeger* and *Welsh* theoretically rested upon interpretations of the Selective Service statutes, the *Seeger* Court stated that a different holding would "classify different religious beliefs, exempting some and excluding others", thus presumably violating the guarantee of equal protection. 380 U.S. at 176 (emphasis added).

⁴ See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966).

⁵ The Colonial tracts were concerned with the "insolence" of British officers who would "enter our houses, search, insult and seize at pleasure." The Bill of Rights: A Documentary History, *supra* n. 2, at 488-89.

⁶ Compare *Katz v. U.S.*, 389 U.S. 347 (1967) with *Olmstead v. U.S.*, 277 U.S. 438 (1928).

⁷ Cf. Henkin, Privacy and Autonomy, 74 Colum.L.Rev. 1410 (1974).

scope and power of the bureaucracy of the executive branch—which has, some argue, heightened the need for judicial oversight. During these years, the archaic "legal interest" requirement of *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118 (1939) has been abolished, *Assoc. of Data Processing Service Org. v. Camp*, 397 U.S. 150 (1970). Standing to challenge administrative orders has been given to competitors, *id.*, and to consumers, *Office of Communication v. FCC*, 359 F.2d 994 (D.C. Cir., per Burger, J., 1966), and a showing of economic injury is no longer required. *U.S. v. SCRAP*, 412 U.S. 669 (1973).

As this trend makes clear, judicial review is, today viewed as a legitimate means of ensuring that agencies observe congressional mandates.⁸ The case before us cannot be viewed in isolation from this trend.

Obviously, I do not suggest that we read the Art. III standing requirement out of existence, or that courts indulge in rendering what Justice Holmes once called "mere declaration[s] in the air."⁹ Nor, of course, do I urge that we ignore recent decisions of the Supreme Court, such as *Warth v. Seldin*, 422 U.S. 490 (1975). But I do counsel against wooden application of the *Warth* precedent to an entirely different setting, and against extension of that holding to cover a situation which, as Judge Oakes's opinion demonstrates, is sharply distinguishable. Such an expansive reading of *Warth* unnecessarily (and with-

⁸ In contrast, as Judge Oakes's opinion points out, the taxpayers or citizens whose suits were thwarted by such cases as *U.S. v. Richardson*, 418 U.S. 166 (1974), *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), as well as *Warth v. Seldin*, 422 U.S. 490 (1975), sought to have the courts intervene in areas in which

the subject matter is committed to the surveillance of Congress, and ultimately to the political process.

Richardson, *supra*, at 179.

⁹ *Giles v. Harris*, 189 U.S. 475, 486 (1903).

out explanation) flies in the face of the recent trend favoring judicial oversight of the burgeoning administrative bureaucracy.

Under the majority's decision, it is unlikely that there could ever be a plaintiff who will be allowed access to the courts to challenge HUD's abdication of its congressionally-imposed duty.¹⁰ Such a result may be logical, and even desirable, in a controversy more appropriately resolved by the political process. See *U.S. v. Richardson*, 418 U.S. 166, 179 (1974). But it is to be shunned in cases like this one which, in my brother Oakes's words, fall "well within the traditional model of judicial review."

GURFEIN, *Circuit Judge* (dissenting) (with whom Chief Judge Kaufman concurs):

I concur in my brother's Oakes' trenchant analysis.¹ I would like to add that I consider his opinion as an important contribution to a debate that is of historic significance. This type of case may become a watershed in the struggle for civil rights, and I am sorry that we could not muster a majority in this court. The history of civil rights in the next quarter century may be written in terms of procedural roadblocks or we may see an expansion of the role courts will play reminiscent of the expansion in John Marshall's day. There is need for judicial action where Congress has mandated benefits for a class and where an agency of the Executive Branch fails to carry out that legislative man-

¹⁰ It is possible, however, that, even under the majority decision, an inner city near a town receiving a HUD grant may have standing to challenge the grant. Indeed, a town which unsuccessfully applied for a grant might, by analogy with those cases granting competitor standing, be allowed to sue.

¹ I have not reviewed again the case authority since my brother Oakes has done that so well.

date. The contrary would give the Executive a silent veto not provided in the Constitution.

This is not a case where general taxpayers are seeking judicial relief against governmental action. The plaintiffs here are not suing as general taxpayers or as officious busybodies. Nor are they seeking to declare any statute or ordinance unconstitutional. They are within the class, minority citizens of the area, whom Congress has sought to help. They are aggrieved persons protesting administrative action in a literal sense. If these plaintiffs have no standing, then who does?

Of course, all black citizens of the entire United States are not in a class to be benefited by a HUD study of the housing policy of New Castle in Westchester County, New York. The class obviously must be more restricted. The issue, to my mind, is simply whether a county is too large an area for its minority inhabitants to be a discrete class with standing. Since there must be some judicial determination of the nature of the class which is harmed by federal inaction in the face of a clear mandate, it is those minority residents who are reasonably close to the housing opportunity, if it should open up, who have a stake in the Congressional mandate enacted for their benefit.

Local zoning ordinances of the type considered in *Warth v. Seldin*, 422 U.S. 490 (1975), have nothing to do with this case. The challenge there was a constitutional challenge to the local zoning laws. The laws were ostensibly not directed against the minority, but could be taken as directed against persons of low or moderate income. It was held that as a prelude to a constitutional claim of discrimination, the plaintiffs must show injury in fact. Here Congress has ordered an administrative agency implementing a particular federal statute to determine whether racially discriminatory policies are being followed by towns which

seek federal subsidies. If the finding is that such discrimination is practiced, the funds are to be withheld. But what happens if HUD fails to look into the matter as it is ordered to do, and, nevertheless, approves the federal funding? My brethren in the majority say nothing is to be done about it by anybody. But, as the Court said in *Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970), "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." I believe that when Congress imposed on the Secretary of HUD the affirmative duty to administer all "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter", 24 U.S.C. § 3608(d)(5), it did not mean that HUD may disregard that mandate in its discretion. And those who have an adversary stake in the inaction ought to be able to compel HUD to make whatever study the court finds is required. The analogy is found in the requirement of an environmental impact statement before a project is begun. The federal courts have taken jurisdiction in such cases. See *United States v. SCRAP*, 412 U.S. 669 (1973). The present complaint presents no less a controversy.²

We talk of separation of powers. Yet, a narrow holding on standing can be the equivalent of a substantive repeal of the legislation. The issue is really not whether the courts should abstain by denying standing, but whether by rejecting standing the courts are impeding national policy as expressed in the legislative will.

² We are, of course, only at the pleading stage and we may not consider whether the appellants can prove their allegations.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 157—September Term, 1974.

(Argued October 21, 1974 Decided June 2, 1975.)

Docket No. 74-1793

RACHEL EVANS, et al.,

Appellants.

v.

JAMES T. LYNN, et al.,

Appellees.

v.

THE TOWN OF NEW CASTLE,

Appellee-Intervenor.

Before :

MOORE, OAKES and GURFEIN,

Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Milton Pollack, *Judge*, dismissing for lack of standing appellants' complaint alleging violation of the 1964 and 1968 Civil Rights Acts, 42 U.S.C. §§ 2000d, 3601. Held, appellants are within the zone of interests protected by the Acts and are sufficiently injured in fact to have standing.

Judgment reversed, cause remanded.

J. CHRISTOPHER JENSEN (Richard F. Bellman, Lois D. Thompson, Suburban Action Institute, Yonkers, N.Y., of counsel), *for Appellants*.

V. PAMELA DAVIS, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Steven J. Glassman, Assistant United States Attorney, of counsel), *for Federal Appellees*.

ARTHUR M. HANDLER (Andrea Hyde, Golenbock & Barell, New York, N.Y., of counsel), *for Appellee Town of New Castle*.

JEREMIAH J. SPIRES (Harry A. Gottlieb, Wiker, Gottlieb, Taylor & Howard, New York, N.Y., of counsel), *for Appellees Douglas Carroll, Director of Tri-State Regional Planning Commission, and Tri-State Regional Planning Commission*.

OAKES, Circuit Judge:

This appeal involves a legal challenge against policies of federal agencies said to flout the requirements of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and Title VIII (Fair Housing) of the 1968 Civil Rights Act, 42 U.S.C. § 3601. Title VI requires federal agencies affirmatively to effectuate its anti-discrimination policy in programs receiving federal financial assistance, 42 U.S.C. §§ 2000d, 2000d-1.¹ Title VIII requires similar effectua-

¹ 42 U.S.C. § 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied

tion of its fair housing policies, 42 U.S.C. §§ 3601, 3608(c), (d)(5).² The federal agencies are the Department of

the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d-1.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

² 42 U.S.C. § 3601.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. § 3608.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development

Housing and Urban Development (HUD) and the Bureau of Outdoor Recreation of the Department of the Interior (BOR), whose respective grants to a municipal sewer district within the Town of New Castle, Westchester County, New York, for construction of a sanitary sewer, and to the Town itself for acquisition of "Turner Swamp" for recreational purposes³ are challenged here as being made to a town that allegedly maintains a racially and economically discriminatory housing and community development program. Suit has also been brought against the regional planning agency, Tri-State Regional Planning Commission (Tri-State), which is the designated clearinghouse which reviews and coordinates applications for federal grants-in-aid in certain counties of New York and New Jersey and certain planning regions of Connecticut, 42 U.S.C. § 3334(a)(1), and which declined to review the grants in question on the grounds that they lacked regional significance.

Appellants assert that they are minority residents of Westchester County who reside in racially concentrated areas of the county and are constrained to do so because the failure of the federal agencies to perform their affirmative duties permits the maintenance of a growing pattern of racial residential segregation both in New Castle and elsewhere in the county. Thus, the case is another in the

in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

³ The grant of matching funds for the sewer was made under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102, and the grant for the acquisition of Turner Swamp was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. § 460(1).

series of cases in this court and others⁴ raising one phase or another in the complex of legal, social, economic and moral problems engendered both by the emergence of the suburbs as increasingly important units of the metropolitan area, significant to the achievement of national goals, and by the realization that housing "does not mean shelter alone—it means a collection of services and opportunities based on locations."⁵ The court below granted the Town of New Castle leave to intervene but denied appellants standing to sue on the basis that they assert no "injury in fact" since enjoining the grants in question would not alleviate their injury (in the form of "ghetto living conditions"); Judge Pollack added that their status as "potential residents" of New Castle did not change this result. (This ruling applied to the federal defendants and to Tri-State.) We disagree, expressing, however, no opinion on the question whether appellants have stated a claim for relief.

On the question of standing as to the federal agencies there are three facts which have to be assumed, as they were below, in the present posture of the case. First, appellants are low-income minority residents of Westchester County who live in "ghetto" conditions, that is, racially-

⁴ E.g., *Citizens' Committee for Faraday Wood v. Lindsay*, No. 73-2590 (2d Cir. Dec. 5, 1974), slip op. 585; *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971). See generally A. Downs, *Opening Up the Suburbs: An Urban Strategy for America* (1973); Brantman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Shields & Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 Yale Rev. L. & Soc. Action 300 (1972). But see Glazer, *On "Opening Up" the Suburbs*, *The Public Interest* 89 (1974). An interesting text in the field is Haar & Iatridis, *Housing the Poor in Suburbia: Public Policy at the Grass Roots* (1974) (hereinafter Haar).

⁵ See Haar, *supra* n.4 at 320.

concentrated low-income neighborhoods.⁶ Second, a matter entirely overlooked in Judge Moore's dissent, the Town of New Castle, to or for whose benefit the challenged grants were made, is, in the words of the district court, "predominantly white [98.7 per cent] and a well-to-do enclave," 90 per cent of which is zoned for single-family, residential development on parcels of more than one acre, with a median value of single-family homes in 1970 in excess of \$50,000; the Town has, not coincidentally, thwarted the New York State Urban Development Corporation's attempt to construct within its borders a small 100-unit low cost housing facility and thus in the words of the court below "continues to be resistant to attempts to alter its present housing character."⁷ Third, the challenged federal

⁶ None of the appellants has been refused the sale or rental of housing in New Castle, has any interest in land within the town or has any connection with any plan or proposal to construct housing for them within the town. Appellant Evans concedes that since September, 1973, she has resided in "decent housing" in a public housing development, with "fine" space. (Her complaint alleging residence in substandard housing was filed August 8, 1973.) It is not claimed that the sewer or park projects will be operated discriminatorily.

⁷ As is recounted in Haar, *supra*, at 360-61, the State Urban Development Commission (UDC) had housing plans for nine of Westchester County's 18 towns, including New Castle.

By going into 9 of Westchester's 18 towns at once, [the UDC president] hoped to avoid putting any one local government on the spot. Instead he has found himself up against a coalition of private citizens and private officials attacking the agency on the issues of big government, local control, and home rule.

United Towns for Home Rule . . . was formed by several dozen residents from three of the northern Westchester towns three days before the UDC formally announced its plan

"What we are saying to the UDC," says Stuart Greene of New Castle, the organization's president, "is, We have not been consulted, you do not have our consent. If we want New York City to move into New Castle, we'll tell you."

Governor Rockefeller and Edward J. Logue, president of the State Urban Development Corporation, have apparently decided to defer

agencies, in approving the grants in question, did very little by way of evaluating the Town's development policies or otherwise,⁸ to perform any allegedly affirmative duties required of them by Title VI and Title VIII respectively;⁹

the UDC's building plans in Westchester County for four months to give the nine towns involved a chance to come up with multi-family housing plans of their own. (*The New York Times*, September 26, 1972.)

The chairman of United Towns for Home Rule, the group that has led the opposition to the state Urban Development Corporation's housing plans in Westchester County, announced yesterday that he was resigning because others in the group's leadership wanted to take it off a present course he characterized as 'moderate.'

In an interview last July, Chairman Greene, a Harvard-educated lawyer, had said he feared that race prejudice rather than the philosophy of local home rule might emerge as the dominant theme in the anti-UDC protest. "The minute I lose a vote to a redneck, I quit," he said then.

Asked whether the events he feared had in fact come to pass, he said, "Yes." (*The New York Times*, October 10, 1972.)

The foregoing Times excerpts were quoted in Haar, *supra* n.4 at 360-61.

⁸ The HUD "rating sheet" for the preliminary application for the sewer grant here does carry some points for, e.g., the "Percent of housing in project area that will be accessible on a nondiscriminatory basis to families and individuals with low and moderate incomes," but there appears to be no evaluation of the overall residential segregation policies of the community. It is a matter of defense on the merits, on which we express no opinion, whether the agencies in fact performed their affirmative duties; for our purposes it is enough if a viable claim of nonperformance is made.

⁹ The project approvals here came after President Nixon's 8,000 word policy statement concerning equal housing opportunity on June 11, 1971, in the course of which he declared that his administration would "not attempt to impose federally assisted housing upon any community." See Haar, *supra* n.4 at 319, 321-22. Cf. N.Y. Times, Dec. 21, 1970, at 1, col. 1, regarding Dayton, Ohio:

The officials [of Dayton], most of whom are Republicans, are worried about how much support they will receive from Washington. They believe the plan fits the philosophy expressed repeatedly by George Romney, Secretary of Housing and Urban Development, but they are disturbed by President Nixon's news conference statement last week that "forced integration of the suburbs is not in the national interests."

The Dayton plan, they say, is voluntary, not forced, but one of the factors that brought its acceptance was the belief that H.U.D.

the approval of each grant in question was based solely on its internal merits (as to which there is no dispute, that is, no claim that either the sewer system or recreation area will be administered discriminatorily).

Assuming these underlying facts, we first face the question whether appellants are arguably within the zone of interests protected by the statutes, that is, whether there is a viable claim that affirmative duties are imposed upon these federal agencies by Titles VI and VIII which would require them to take some action, not taken here, on behalf of county residents such as withholding otherwise proper grants. Absent such an arguable claim of affirmative duties owed to appellants, they are not within any zone of statutory protection. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Put another way, we must consider whether either of these agencies is alleged to have "consciously and expressly adopted a general policy [of nonenforcement] which [is] in effect an abdication of its statutory duty." *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc, per curiam) (ordering HEW to take affirmative action to end segregation in ten states' public educational institutions receiving federal funds, at suit of black "students, citizens and taxpayers"). We think such a viable claim is clearly made out under the

would use Federal grants in a way that would encourage open communities.

"If political pressures build up so that the suburbs can continue to flout low and moderate income housing and still get their money from Washington there is little we can do," said one official.

Further, the development here illustrates what is involved in the housing controversy that has been under way in the national government. Plans by the Department of Housing and Urban Development to make a strong stand for open communities in the administration of Federal grants have been questioned by Attorney General John N. Mitchell and the White House.

express language of the Acts, nn. 1 and 2 *supra*, the legislative history and the case law.

Title VI requires effectuation of § 2000d by agencies "empowered to extend Federal financial assistance to any program or activity, by way of grant" 42 U.S.C. § 2000d-1. Title VIII requires administration of housing and urban development programs and activities in all agencies "affirmatively to further the purposes" of the Act, as expressed in 42 U.S.C. § 3601, n.2 *supra*.¹⁰ It

10 Arguably, the fact that the grants are made to a community which is near an urban area would not necessarily make them grants relating to "urban development," since in an era of superhighways and jet travel every community is in a real sense near an urban area. Title VIII, 42 U.S.C. § 3608(c), requires only that the agencies "administer their programs and activities relating to housing and urban development" (emphasis added) affirmatively to further fair housing. Similarly, 42 U.S.C. § 3608(d)(5) specifically requires HUD so to administer its programs and activities "relating to housing and urban development" Arguably neither the HUD grant here nor the BOR recreation grant is for a program relating to housing or to urban development.

We are aided here, however, by the interpretation of Title VIII by HUD itself, one which is entitled to substantial weight. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). HUD has formally stated as recently as October, 1972, that the affirmative action requirements do extend to grants for sewer installation such as here involved:

A substantial number of programs are subject to these affirmative provisions including those relating to urban renewal, model cities, grants for sewer and water installation, roads, schools and other public facilities relating to urban development.

U.S. Dep't of Housing and Urban Development, Historical Overview—Equal Opportunity in Housing, quoted in P-H Equal Opportunity in Housing ¶ 2301, at 2316 (emphasis added). The HUD regional administrator stated in his deposition that the Water and Sewer Program was subject to Title VIII requirements. This explains the rating or selection system which, as he said, "did give extra points to those communities with open housing policies."

The same might not be said of the BOR grant which was from the Land and Water Conservation Fund, n.3 *supra*. A grant made under that Act would not necessarily be a "housing" or "urban development" grant under Title VIII. But BOR itself considers New Castle an urban area, both as having a population of over 2,500 and as a satellite community. And BOR's Regional Director demonstrated the nexus which appellants urge, in his deposition that "existing housing patterns and

may be that, as the federal appellees suggest, because Title VI is somewhat limited in remedy, it is not so much involved, although this is a question ultimately on the merits; Title VI contains language in its so-called "pinpoint provision" that limits the power of the agency to terminate funding "to the particular program, or part thereof, in which such [discrimination] has been so found." 42 U.S.C. § 2000d-1, n.1 *supra*. See *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972) (HUD could release Model Cities funds to city independent of city housing authority's discriminatory site selection and tenant assignment procedures). See 86 Harv. L. Rev. 427 (1972).

But the same limitation or "pinpoint provision" does not apply to Title VIII. The legislative history of Title VIII is indicative of its scope. In introducing the legislation Senator Mondale referred to the

sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.

Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the Amer-

desirable housing patterns ought to be a factor in the planning process in assessing [recreation] needs and we attempt to encourage consideration of all community needs and not just to leave ourselves merely concerned with recreation, because it's important to the fabric of this system."

ican city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong. Rec. 2278 (1968).

So too Representative Celler said: "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos" 114 Cong. Rec. 9563 (1968).

The cases relating to duties created by Titles VI and VIII include *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970); *Brookhaven Housing Coalition v. Kunzig*, 341 F. Supp. 1026 (E.D.N.Y. 1972); *Garrett v. City of Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971). See also *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). The Third Circuit held in *Shannon, supra*, that HUD could not approve a change in an urban renewal plan (from "owner occupied" to "rent supplement" dwellings) without considering under the affirmative duty requirements of Titles VI and VIII whether "the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial discrimination." 436 F.2d at 822. So holding the court said that "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." 436 F.2d at 821. Clearly the federal government, to the extent it is in the business of granting housing and development funds to communities, is in a central position to exert influence upon, or against, concentration of minority groups in limited areas. As put in dictum by Mr. Justice Stewart in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968), Title VIII at least is "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete

arsenal of federal authority." Here appellants claim no influence was exerted; the housing law remained unenforced.

We must not only be aware of, we must be guided by the teaching of *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972), a case involving the question whether complaining tenants were within the class of persons expressly entitled to use under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(a), that in connection with fair housing litigation "the main generating force must be private suits . . ." and that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns' [quoting Senator Mondale]." So, too, the Court has advised us that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973), citing *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. at 212 (White, J., concurring). The limitation on this is that there must be an "indication that invasion of the statutory right had occurred or is likely to occur." *O'Shea v. Littleton*, 414 U.S. 488, 494 n.2 (1974). Here the "statutory right" is to have programs and activities "relating to housing and urban development" administered in furtherance of the fair housing policy. That right is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered.

We are satisfied, then, that the first of the two prongs of the test of standing is met; appellants are arguably within the zone of interests protected by Titles VI and VIII. The inaction on the part of the federal agencies here may have created a breach of their affirmative duties under these Acts and these Acts were designed to protect people

such as these appellants who continue to live in ghettoized communities in the New York City metropolitan area. Title VI protects every person in the United States from discrimination in applicable projects, and Title VIII seeks to ensure fair housing throughout the United States. 42 U.S.C. §§ 2000d, 3608, nn. 1 and 2 *supra*.

Have, however, the appellants demonstrated a nexus between their injury (it is postulated in the opinion of the district court that "ghetto living conditions are a very real and very serious 'injury' ") and the claim of omission of federal civil rights enforcement with respect to the New Castle community development grants? That is, is there asserted an "injury in fact" to these appellants? If we were to look, as the appellees and intervenor would have us look, solely toward New Castle's housing and land-use policies, we would have to answer in the negative, if for no other reason than that a recent decision of this court, *Warth v. Seldin*, 495 F.2d 1187 (2d Cir.), *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974), would require us to do so.¹¹ In this respect, appellants have no connection whatsoever with New Castle; there is no showing that they would even try to live in New Castle.

But the gist of appellants' complaint is the failure of HUD and BOR to implement Title VIII, the fair housing law, an act which was intended to change the functions of federal grant programs the history of which, as Senator Mondale's quoted remarks suggest, reinforced existing, if not created new, patterns of racial segregation.¹² In this instance appellants allege injury from appellees' allocation

¹¹ *Warth* held that "potential residents" of a community lacked standing to challenge its exclusionary zoning policies.

¹² See Haar, *supra* n.4 at 338 (mortgage insurance and aid to highways as examples of "federal funds . . . partly responsible for present residential socio-economic segregation"); U.S. Comm'n on Civil Rights, Equal Opportunity in Suburbia 43 (July 1974).

of funds to New Castle in violation of Titles VI and VIII which contributes to the perpetuation of appellants' living patterns in the New York City metropolitan area.

Here, then, are agencies with an affirmative duty to encourage fair housing. Allocation of grants without assessing their impact on integration not only may maintain the status quo of living patterns, resulting in injury to those who must continue to live in ghettos, but may also increase the disparity between living styles by supporting "white enclaves" while diverting funds which otherwise would have been used to alleviate ghettoization. In *United States v. SCRAP*, 412 U.S. 669 (1973), plaintiffs alleged that the Interstate Commerce Commission's failure to suspend increased freight rates would discourage use of recycled products to the detriment of the environment which they enjoyed. Such omission, they claimed, violated the ICC's duties under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). The Court found those plaintiffs aggrieved within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 702. *Id.* at 685. The Court also held that

To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Id. at 688. As in *SCRAP* we have plaintiffs injured in fact by administrative inaction. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966). Cf. *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). This is sufficient to give plaintiffs standing to challenge administrative violations of statutory duties. This case is

distinguishable from the recent Supreme Court cases so heavily relied upon in Judge Moore's dissent,¹³ in which standing was denied to plaintiffs bringing constitutional challenges to statutes since they contain an underlying, if not articulated, minor premise that Congress cannot enact a statute conferring standing to bring a constitutional challenge. See Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1380-83 (1973). But where Congress has created a duty, Congress can declare that anyone aggrieved can enforce the corollary right. Again, standing is conceptually broader where a statutory duty has been violated than when prosecutorial or judicial discretion is challenged, since there is no statute conferring review of such actions.¹⁴

So that our decision may be very clearly understood, we hold only that appellants have standing as to the federal agencies to challenge the particular grants in question. We do not do so on the basis that they have a sufficient connection with the community to or for the benefit of which the grants are made. We do so purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development. The grants here involved, made to an urban community, or one that is satellite to a metropolitan

13 *O'Shea v. Littleton*, 414 U.S. 488 (1974); *United States v. Richardson*, 42 U.S.L.W. 5076 (U.S. June 25, 1974) (constitutional challenge to act permitting CIA not to disclose all its expenditures). Cf. *Schlesinger v. Reservists Committee to Stop the War*, 42 U.S.L.W. 5088 (U.S. June 25, 1974) (no standing to challenge Congressmen's reserve status as violative of the incompatibility clause).

14 *O'Shea v. Littleton*, 414 U.S. 488 (1974) (no standing to challenge bond-setting, sentencing and jury fee practices as violative of 42 U.S.C. §§ 1981-83, 1985); *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973) (no standing to compel prosecution of the father of plaintiff's illegitimate child for nonsupport).

area of which appellants are residents, are so related. *United States v. SCRAP*, *supra*; *Trafficante v. Metropolitan Life Insurance Co.*, *supra*; *Adams v. Richardson*, *supra*.

My brethren are in accord that the complaint against Tri-State must be dismissed. In stating my dissenting view, I note that while Tri-State is an interstate body, both corporate and politic, serving as a common agency of Connecticut, New Jersey and New York, created by compact,¹⁵ it has been designated as the areawide clearing-house for review of applications for federal aid to assure conformance with regional comprehensive plans, a designation which occurs under Circular A-95, promulgated by the Office of Management and Budget, *see* 38 Fed. Reg. 228 (1973), to implement the Demonstration Cities and Metropolitan Development Program Act, 42 U.S.C. § 3334, and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231. The latter commands consideration of impact of the proposed program upon housing and human resources development. 42 U.S.C. § 4231(c). The A-95 Circular specifically calls for comment on the "civil rights aspect of the project," § 3(d), and "[t]he extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." § 5(d).

It is true that all that Tri-State allegedly did here was to say that the proposed grants had no "regional significance." But it seems to me that appellants are precisely those minority persons who are disadvantaged by unbalanced "patterns of settlement and delivery of services."

¹⁵ Conn. Public Acts, 1965, P.A. 41; Laws of N.J., 1965, c.12; Laws of N.Y., 1965, c.413. The Compact was amended in 1972 to expand Tri-State's role to embrace responsibility for comprehensive planning for the compact region, Conn. Public Acts, 1971, P.A. 450; Laws of N.J., 1971, c.161; Laws of N.Y., 1971, c.333.

Judgment reversed and remanded as to James T. Lynn, the Department of Housing and Urban Development and the Bureau of Outdoor Recreation of the Department of the Interior; judgment affirmed as to appellee Tri-State Regional Planning Commission.

MOORE, *Circuit Judge*, dissenting:

Essentially there is presented in this litigation the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of, discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. §3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. §460 l (1963). Obviously an abstract answer cannot be given, as it were, in a vacuum. Hence the facts essential to a resolution of this controversy must be analyzed with great particularity. In short, who are the plaintiffs, what relief do they seek, what is the legal basis for their alleged grievance, who are the defendants, what wrongs have they allegedly committed and finally wherein did the trial court commit error in the judgment appealed from?

THE PLAINTIFFS

Plaintiffs describe themselves as Black residents, respectively, of the Town of Peekskill, the City of Mount Vernon, the City of White Plains and the Town of Ossining, all in Westchester County, who (with the exception of the plaintiff Evans) express a desire to live in the Town of New Castle, also in the same County, but profess inability to

do so because of New Castle's alleged "discriminatory land use practices."¹

THE DEFENDANTS

The defendants are James T. Lynn, as Secretary of the Department of Housing and Urban Development (HUD); Joseph D. Monticciolo, Acting Area Director of HUD (New York); S. William Green, Regional Administrator of HUD; HUD; Douglas Carroll, as Director of Tri-State Regional Planning Commission (Tri-State); Tri-State; Rogers C. B. Morton, as Secretary of the Department of the Interior (Interior); James A. Watt, as Director of the Bureau of Outdoor Recreation (BOR) of Interior; and Interior.

THE COMPLAINT

The King-Greeley Sewer District Grant

The complaint, in substance, alleges that New Castle in 1969 determined to install in the Chappaqua section² of New Castle a sanitary sewer system. For this purpose it created the King-Greeley sewer district.³ New Castle thereafter made an application to HUD for federal financing of the project.⁴ "HUD was specifically notified that black and Spanish-speaking persons and all other persons of low income would be denied the opportunity to benefit from Federal funding of the King-Greeley sewer project by virtue of the fact that New Castle through its housing and zoning laws prevents the development of low and moderate

¹ Plaintiff Brooks, Jr., merely wishes to move to "safe and sanitary housing in the County which he can afford."

² Hamlet of Chappaqua.

³ King-Greeley was organized under the New York Town Law (McKinney 1965).

⁴ The application in the name of "King-Greeley Sanitary Sewer District," dated January 9, 1972, was submitted to HUD.

income housing." (Complaint, par. 21.) Nevertheless HUD granted \$358,000 for the project.

The emphasis of the complaint is on New Castle's alleged housing, zoning and land use policies. Neither New Castle nor King-Greeley were named as defendants.⁵ Plaintiffs seek indirectly to obtain their objective not by a frontal attack on New Castle on the theory of unconstitutional zoning⁶ but by an oblique attack on HUD for failing, in making the sewer grant, "to affirmatively promote fair and suitable housing irrespective of race, color, creed, or national origin pursuant to 42 U.S.C. 3608(d)(5)." (Complaint, par. 36, First Cause of Action); and that HUD by the grant did "assist and encourage New Castle in its practice of racial discrimination" and denying to plaintiffs "their right to participate in the receipt of Federal benefits." (Complaint, par. 37, Second Cause of Action.)

Plaintiffs assert that they "are Black citizens suffering from a lack of fair housing opportunity in the County in which they reside—" (Brief, p. 23) and attribute this suf-

⁵ Their presence in the case is as subsequent intervenors.

⁶ King-Greeley has no zoning authority or powers. In *Warth v. Seldin*, 495 F.2d 1187 (2d Cir.), cert. granted, 43 U.S.L.W. 3208 (1974) (argued Mar. 17, 1975), this court was faced with a direct (not oblique, as here) attack on the zoning ordinances of the town of Penfield, a suburb of Rochester. There builders had been denied the opportunity to construct multi-family housing in Penfield. The plaintiffs claimed that Penfield's zoning ordinances were unconstitutional because they barred low and middle income persons, especially members of racial minority groups, from residing in Penfield. After reviewing *Baker v. Carr*, 359 U.S. 186 (1962); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83 (1968); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Barlow v. Collins*, 397 U.S. 159 (1970); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972); and other cases, this court concluded that to grant injunctive relief or to make a declaration that zoning was unconstitutional upon the facts presented would be "too abstract, conjectural and hypothetical to establish an Article III case or controversy" (p. 1193) and affirmed "on the ground that appellants lack standing." (p. 1189).

fering to the agencies vested by Congress with the power to administer and allot the financial grants made available by Congress in alleging that "they [the agencies] have neglected to administer the civil rights requirements of the community development assistance programs to promote an increased supply of integrated housing . . ." (Brief, p. 23) and that "[t]he housing and land-use policies of New Castle are certainly an effective measure of the extent to which HUD and BOR have violated their independent civil rights obligations." (Brief, p. 25.) Plaintiffs would have the judiciary focus by means of this litigation on "the specific and nationwide abdication by HUD and BOR of their statutory civil rights obligations, as reflected by their failure to engage in any meaningful civil rights review of the New Castle applications for federal community development grants." (Brief, p. 25.)

The Turner Swamp Grant

In 1971 New Castle proposed to acquire some 35 acres of land consisting largely of a bog or marsh area. New Castle requested Federal aid for this Open Space and Recreation project. A review was made by the requisite agencies, Tri-State, Westchester's Department of Planning and appropriate sub-regional planning agencies and municipalities. Tri-State classified the project as "one of non-regional significance." After an inspection by an inspector of BOR who reported that the site ("almost entirely marsh and bog") seemed "to provide excellent wildlife habitat and the proposed impoundment should enhance this quality," a grant (approximately one-half of the estimated cost of \$115,000) was made by Interior. Tri-State characterized the area as "a highly suitable conservation area for use as a managed wildlife area, where a varied wildlife population already exists and needs only to be encouraged." (Tri-State Appendix 11.)

THE PROCEEDINGS BELOW

On September 13, 1973, the defendants, the Secretaries of HUD and Interior and certain Directors of various divisions thereof moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6), Fed. R.Civ.P. An affidavit of an Assistant United States Attorney pointed to the alleged weakness of the complaint by stating that plaintiffs made no allegation therein that either the Sewer District or the Turner Swamp would be in any way discriminatory or would not serve all residents equally "black, or white, rich or poor."

On October 9, 1973 plaintiffs moved for a preliminary injunction enjoining HUD from disbursing any funds for the King-Greeley sewer district and Interior from disbursing funds for the acquisition of the Turner Swamp.

The trial court, believing that it could not adequately pass upon the issues raised by both motions without a record showing what HUD and BOR had done prior to approving the grants, directed that the administrative files of each Department relating to the grants in question be made available to the plaintiffs and that the federal administration officials involved be produced for depositions.

Accordingly, during November 1973 the depositions of S. William Green, Regional Administrator (HUD); Gerald V. Cruise, Program Manager (HUD); Susan Alem, Resources Development Officer (HUD); Robert E. Mendoza, Metropolitan Development representative (HUD); Bernard C. Fagan, Outdoor Recreation Planner (BOR); and Maurice D. Arnold, Regional Director (BOR) were taken. Various exhibits were introduced.

Prior to decision and by letter dated March 9, 1974, New Castle and King-Greeley sought to intervene. The deposition of the plaintiff Evans was thereafter taken.

On April 5, 1974, many of the key factual issues were resolved by a Stipulation of Facts entered into (by counsel) by the plaintiffs and New Castle (King-Greeley). The substance of the stipulation was that none of the plaintiffs had "looked for housing for himself or his family in the Town of New Castle"; that no plaintiff or the town of his residence had been deprived of the federal funds granted as herein described; that plaintiffs had no information to believe that non-residents of New Castle would be refused admission to the proposed park (Turner Swamp) for any reason including race, creed, color or income; that no claim is made that persons residing in the King-Greeley district will be denied use of the sewer for reasons of race, creed, color or income; and that there is no claim that the Turner Swamp area has been utilized for low or moderate multi-family housing.

Upon this stipulation and lengthy affidavits with exhibits attached, the deposition of the plaintiff Evans, New Castle and King-Greeley, joined the federal defendants' motion to dismiss.

Tri-State had also moved to dismiss pursuant to Rule 12 (b)(1), (2) and (6), an attorney affidavit accompanying the motion, stating that it was "upon grounds of sovereign immunity". Tri-State had been formed pursuant to an Interstate Compact (New York, New Jersey and Connecticut) wherein in Article IV, sec. 3 it is declared that "It [the Commission] shall enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever; . . ."

THE OPINION BELOW

As a preamble, in effect, to the opinion, the court noted that the plaintiffs had been "accorded a wide opportunity to make a factual determination of the New Castle ap-

plications and the civil rights enforcement procedures utilized by the federal defendants." Equally the defendants "had an opportunity to elicit the facts concerning the interest of the plaintiffs." The court concluded that the "legal issue of standing raised by the motions, is now cast in sharp relief against this well-developed factual background."

The court then turned to the threshold and, in its opinion, decisive issue, i.e., "whether plaintiffs have standing to bring this suit." Standing was then tested by "the two-pronged test" namely, have the plaintiffs suffered or will they suffer an "injury in fact" and are they "within the zone of interests protected by the relevant statute." The court was also mindful of the necessity that "litigants maintain a personal stake in the outcome of the controversies they present." *DeFunis v. Odegaard*, 416 U.S. 324 (1974).

From the proof submitted, the court concluded that "Plaintiffs do not, and apparently cannot, allege that they will suffer any injury from the grants that have been made by the agencies," which grants clearly insure that New Castle must not discriminatorily administer the sewer or swamp projects. (See "Assurance of Compliance" of HUD and BOR). Accordingly, the court denied plaintiffs' motion for an injunction and dismissed the complaint for lack of jurisdiction.

I

Before the motions were finally submitted to the court for decision, they had acquired somewhat of a hybrid character. The original government defendants' motion to dismiss pursuant to Rule 12(b)(1) and (6) Fed.R.Civ.P. was supported by a five-page affidavit setting forth facts. Plaintiffs' motion for a preliminary injunction was based

on two lengthy affidavits. Tri-State's motion was supported by an affidavit and New Castle—King-Greeley's motion by affidavits of 19 pages and 7 pages plus exhibits. The motion to dismiss thus assumed the status of a motion for summary judgment which in decision the court restricted to the issue of standing. However, only by this factual development was the court able to "cast [this issue] in sharp relief." For purposes of appellate review, "standing" may be assumed to be the sole issue to be determined in light of all the facts developed by the trial court in aid of such determination.

II

Prior to embarking upon a discussion of how the Supreme Court has defined, and granted or denied, jurisdictional standing, it would be well to capsule the nature of this action in terms of plaintiffs' objectives. First, the negative. They do not claim that they have been denied housing or land purchase in New Castle because of color. They do not seek to overturn the New Castle's zoning ordinances as unconstitutional. They do not assert that the funds appropriated will deprive any low-cost housing project thereof. They do not claim that there are any discriminatory features in the sewer and swamp grants.

Affirmatively what they seek is to prevent HUD and BOR from using federal funds (1) for aid in constructing a sewer in a small densely populated section of the Town of New Castle where neither housing or zoning are in question because the area is already well built up on quarter and half acre plots⁷ which area is badly in need

⁷ Tri-State Appendix 4. "The area is almost entirely developed with existing residential and business uses . . . the establishment of sewers in the King-Greeley Sewer District area will not alter, or offer the opportunity to alter, the range of densities proposed for residential development, since the area is already substantially developed with

of sewers for reasons of health;⁸ and (2) from acquiring a swamp to protect the environmental quality of the area by preserving open spaces for a wildlife sanctuary and for educational purposes, the very goal and concern of so much of our current legislation.

Another pertinent inquiry at this stage is: what would be the result of success for plaintiffs in this litigation? Primarily it would be to prevent their fellow-citizens who are as much in need of sewers as they claim to be in need of housing from having sanitary sewers and a wildlife sanctuary or park, thus preserving fast-shrinking open spaces. But a far more dangerous result would be the establishment of a principle that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned (or even overturned) by any citizen, aided by the judiciary, to determine whether the decision (such as HUD's and BOR's here) was to their liking. In short, all administrative agencies will have to make their decisions with the knowledge that Big Brother⁹ in the guise of a private attorney-general is peering over their respective administrative shoulders.

In sum, plaintiffs, in a suit challenging only a sewer and a park, seek by an oblique coercive proceeding to have this court, in effect, direct HUD to provide more housing throughout the nation. This conclusion is well-illustrated

single-family homes that are of good quality and have a considerable period of useful life remaining." Letter, December 28, 1971, Commissioner of Westchester County Department of Planning to New Castle Town Engineer. Tri-State Appendix 29.

⁸ "[T]he extension of sewers into the service area will greatly improve the environmental and public health aspects of this central area of your town . . . [and is an] improvement of the highest priority, and one which should receive every favorable consideration for Federal aid."

⁹ G. Orwell, 1984, written in 1949 as a fantasy. Now with only nine years remaining to stave off the prophecy, the date is becoming dangerously close.

by their argument that "the lack of federal administrative pressure on New Castle to encourage fair housing opportunity within its borders through local housing and community development policy directly and materially contributes to growing patterns of racial segregation in Westchester County." (Applt's Brief, p. 39).

In fairness to HUD and BOR they are entitled to have set forth what they did before making the grants in question. No claim is made that any project discrimination exists as to the King-Greeley or Turner Swamp projects. Title VI, 42 U.S.C. 2000 d. HUD also attempted to follow the requirements of Title VIII, 42 U.S.C. 3601 et seq., albeit the loss of the original rating sheet required reconstruction and there were differences of opinion within the Department. Furthermore, the sewer project had been approved by the appropriate County and State departments. Likewise, as to the Turner Swamp, Interior through BOR and the State Liaison Officer had rated the project as qualified for a grant.

III

The guiding principles of law applicable to the proper decision here are to be found in the Supreme Court's recent decision in *O'Shea v. Littleton*, 414 U.S. 488 (1974). There, as here, an injunction was sought on the basis that the defendants "have engaged in and continue to engage in, a pattern or practice of conduct . . . all of which has deprived and continues to deprive plaintiffs of their constitutional rights. The Supreme Court gave a most explicit statement as to the essentials for "standing" stating:

"Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from some putatively illegal action before a federal court may assume jurisdiction.' . . . There must be a 'personal

stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question.' . . . Nor is the principle different where statutory issues are raised. . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of some challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' " (p. 493-94) (citations omitted)

Within the year the Supreme Court has again reaffirmed its views as to standing in *United States v. Richardson*, 418 U.S. 166 and *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208 (both decided June 25, 1974). In these recent decisions the Court expressed its opinion as to the effect of its former (although also recent) decisions defining standing. Since these former decisions are heavily relied upon by the majority, an analysis of the June 25, 1974 decisions and some of the preceding decisions should suffice to demonstrate that the majority opinion cannot be reconciled with them.

In *Schlesinger* the Court "recognized the continued vitality" of *Ex parte Lévelt*, 302 U.S. 633 (1937) (p. 220), and reaffirmed that decision, holding that there must be a concrete injury "actual or threatened", namely, "a particular injury caused by the action challenged as unlawful"—in short, a "particular injury" and a "personal stake." This concrete injury "is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government;" and "the relief sought would, in practical effect, bring about conflict with

two coordinate branches." (p. 222) What the plaintiffs seek to achieve here would indeed "distort the role of the Judiciary in its relationship to the Executive and Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" (p. 222). In holding that there was no citizen standing in *Schlesinger*, the Court noted the restrictive nature of *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970) ("private competitive injury"), and *United States v. SCRAP*, 412 U.S. 669 (1973) ("individual enjoyment of certain natural resources impaired").

In *Richardson*, the Court observed that there is a modern tendency to call upon the courts to solve all problems of society but adhered to the "personal stake" requirement, stating:

"As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than in any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . in short, something more than 'generalized grievances,' . . ." (p. 179-80) (citations omitted).

The concern of Mr. Justice Powell regarding "the expansion of judicial power" should well be a worry here. In his concurrence he wrote:

"Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing an unrestricted taxpayer or citizen standing would significantly alter the allo-

cation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and head-on confrontations between the life-tenured branch [the judiciary] and the representative branches of government will not, in the long run, be beneficial to either." (p. 188) (footnote omitted).

It would be in the Justice's opinion, as it is in mine, highly inconsistent "if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure, insulated, judicial branch." (p. 188) (footnote omitted). "Unrestricted standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." (p. 189).

In the same vein, Mr. Justice Powell commented that "recourse to the federal courts [where the Federal Government has allegedly been unresponsive to recognize needs or serious inequities in our society] has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform." (p. 191). But he observed "how often and how unequivocally the Court [the Supreme Court] has expressed its antipathy to efforts to convert the judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." (citing cases) (p. 192).

In *Sierra Club v. Morton*, 405 U.S. 727 (1972), the Sierra Club, whose members are interested in preserving woodlands and wildlife, in contrast to the destruction of forests and the construction of broad concrete highways, sought to enjoin the building of a vast resort and amusement center, including roadways, in the Mineral King

Valley in California. The District Court had granted an injunction but the Court of Appeals reversed stating among other things that "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional Authority." 433 F.2d 24, 30 (9th Cir. 1970).

The Supreme Court affirmed the Court of Appeals, writing with particular pertinence to the litigation before us, at page 732: "Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

Congress in the Civil Rights Act of 1964, 42 U.S.C. §2000 d (Title VI) clearly evidenced its intention to limit the question of discrimination to the *particular* program in issue. See 42 U.S.C. §2000 d-1. As previously mentioned, no discrimination is claimed in either program here, and thus Title VI cannot support the standing of these plaintiffs. Nor is the Civil Rights Act of 1968 any more applicable. Congress clearly stated its intent: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. §3601.

The Court in *Sierra Club* continues with the principle that: The "injury in fact" test requires more than an injury to a cognizable interest. "It requires that the party seeking review be himself among the injured." (p. 735). The Court would deny standing to those "individuals who

seek to do no more than vindicate their own value preferences through the judicial process."

The consequences of any other result were pointed out as follows: "And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why an individual citizen with the same bona fide special interest would not also be entitled to do so." (p. 739-40).

In *United States v. SCRAP*, *supra*, the Court was dealing "simply with the pleadings in which appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." (p. 689) (footnote omitted). The Court could not "say on these pleadings" that injury in fact could not be proven.

But in *Laird v. Tatum*, 408 U.S. 1 (1972), the respondents' claim "simply stated, is that they disagree with the judgments of the Executive Branch. . . ." (p. 13). On this subject the Court noted that: "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . ." (p. 15). Accordingly the Court reversed a Court of Appeals decision which had reversed the District Court's denial of an injunction and dismissal of the complaint.

IV

THE MAJORITY OPINION

Court decisions should be made with an eye to, and with due regard to, the practical consequences thereof. The consequences of the majority's decision are that the residents of the Hamlet of Chappaqua will not have their much-needed sewer or park. And this, by court decree instigated by a group of plaintiffs who have no interest whatsoever

in a King-Greeley sewer or a Turner Swamp park, neither of which projects admittedly has any discriminatory features. The majority states that "Here, then, are agencies with an affirmative duty to encourage fair housing." However, "fair housing" is not an issue in this case (if "case" it be). To say that plaintiffs' right to adequate housing "is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered" is a most illogical *non sequitur*. Equally illogical is it to say that the allocation of funds to New Castle "contributes to the perpetuation of [plaintiffs'] living patterns in the New York metropolitan area." \$358,000 and \$57,500 would scarcely suffice for a low-cost housing project.

Admitting that plaintiffs do not have "a sufficient connection with the community to or for the benefit of which the grants are made", the majority believes that it can exert court coercion upon HUD and Interior as well as Tri-State "because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development." They then find that the grants "are so related."

V

TRI-STATE

Tri-State is not a federal agency. It has made its own independent appraisal of the King-Greeley sewer and Turner Swamp projects as of "non-regional significance." Accordingly, review of the projects was referred to the Westchester County Department of Planning. It scarcely befits the role of the federal judiciary to override and supersede the judgment of Tri-State in evaluating whether a sewer in a minute area of a town and a small wildlife

park are of sufficient area concern as to call for Tri-State action and reaction. I find no error in Judge Pollack's dismissal of the complaint against Tri-State.

VI

In conclusion I cannot reconcile the majority's holding with the Supreme Court's decisions in *Sierra Club*, *O'Shea*, *Richardson* and *Schlesinger*, all of which support Judge Pollack's denial of a preliminary injunction and dismissal of the complaint. Accordingly, I dissent and would affirm Judge Pollack's order.

GURFEIN, *Circuit Judge*, concurring and dissenting:

I concur in Brother Oakes' thoughtful opinion holding that the plaintiffs have standing with respect to defendants HUD and BOR. I must add some words of caution, however, to explain my position. I believe that Judge Pollack's decision was based on a pragmatic view that the case itself, so far as injunctive relief against the grant of federal funds is concerned, may ultimately end in a mere spinning of wheels, for the plaintiffs may not have suffered sufficient "injury in fact" to enjoin the federal grants. While Judge Oakes carefully notes that we are not deciding the merits, I would like to make my own position even clearer.

I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination by HUD to grant funds to New Castle is subject to judicial review and, if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment. I would hold *only* that the plaintiffs are "adversely affected or aggrieved by agency action within

the meaning of a relevant statute" under the Administrative Procedure Act, Section 5, U.S.C. § 702, to raise the question of whether the Secretary has failed to make the inquiries implied from his affirmative duty "to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" Pub. L. 90-284, Title VIII § 808(l)(5), April 11, 1968, 42 U.S.C. § 3608(d)(5), without any consideration of the merits of the lawsuit. See *United States v. SCRAP*, 412 U.S. 669 (1973).

In 1968 Congress passed the "Fair Housing" Act prohibiting discrimination in the sale or rental of housing. Civil Rights Act of April 11, 1968, Pub. L. 90-284, Title VIII § 801, 42 U.S.C. § 3601. It contains the general affirmative duty provision noted. 42 U.S.C. § 3608(d)(5).

The Supreme Court has not yet determined whether the affirmative duty goes beyond enforcement of the sale and rental provisions of the Fair Housing Act. Nor has it decided whether, in the absence of hearing and notice provisions like those contained in the Civil Rights Act of 1964, Congress intended that the federal courts should review HUD's policies in relation to grants under the Housing and Urban Development Act of 1965, with the power to issue injunctions against federal assistance to non-pinpointed programs which are not, in themselves, discriminatory.

I think that, in conformity with our national policy to eliminate the disgrace of racial discrimination, the plaintiffs should be heard to test whether HUD has done its duty in the premises. *Data Processing Organization, Inc. v. Camp*, 397 U.S. 150 supports the result, as does *SCRAP*, *supra*.

Although the question is close, minority people fairly near the geographical area involved may be deemed "aggrieved" by agency inaction, at least in the general way

that the environmentalist law students were injured by the inaction of the Interstate Commerce Commission in *United States v. SCRAP*, *supra*, or the class of black students in *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973). The failure of the Executive Branch to enforce a statutory duty imposed on it may cause injury in fact to the class affected, even though, as Judge Oakes states, "no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). That does not mean, to be sure, that they can compel judicial review. In that sense, as Judge Oakes recognizes, standing and judicial review are discrete issues.

In cases raising issues of discrimination, as well as environmental considerations, all that conferring standing under the Administrative Procedure Act does is to let an Article III "case or controversy" be heard with the sharp adversity required. See *SCRAP*, *supra*.

The courts must still determine the extent, if any, of permissible federal coercion by the withholding of federal assistance. Cf. *Adams v. Richardson*, *supra*. That is why it is proper to allow standing to these plaintiffs so that they may raise, in a judicial context, what the obligations of HUD are and whether HUD has met them. We should be liberal in granting standing where the challenge is to alleged administrative failure to act in the face of an alleged statutory duty, particularly in a civil rights case. As Judge Oakes notes, that is the meaning of *United States v. SCRAP*, *supra*. Cf. *Shannon v. HUD*, 436 F.2d 809 (3 Cir. 1970). In my view, a person may be an "aggrieved person" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, to remedy administrative inaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not

have been injured in fact sufficiently to coerce the executive agency to withhold funds.

On the standing to sue Tri-State I respectfully disagree with my brother Oakes. There must be some balancing of interest. To allow every denial of area significance to be reviewed by the courts, particularly at the instance of persons as remote from area considerations as these plaintiffs are, would simply invite a plethora of suits with a grave question of the ultimate judicial competence to solve them. Whether a sewer pipe in a town is a concern of a large area need not be litigated in the context of racial discrimination. It is better to dismiss the complaint against Tri-State now, as Judge Pollack did. In that respect I agree with Judge Moore though for somewhat different reasons.

Lastly, I must disassociate myself from my brother Moore's statement that the issue is "the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. § 4601 (1963)." When Congress imposed on the Secretary of HUD the affirmative duty to administer all "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" 42 U.S.C. § 3608(d)(5) it did not mean that HUD could disregard that mandate "in its discretion." In fact, HUD has adopted procedures to determine local racial policies in the case of the New Castle grant.

The case may well be a close case, but it is not out of the mainstream of court review of agency inaction in the face of a statutory duty. When Congress says federal funds shall not be used if certain conditions exist, the courts are often not without jurisdiction to review. The majority opinion does not mean that New Castle shall not have its sewer. If that should be the end result of the judicial process it will be only because Congress, not the courts, determined the national policy against the particular use of federal funds, which the courts were required to respect.

Opinion of the District Court.

Rachel EVANS et al., Plaintiffs,

v.

James T. LYNN, in his capacity as Secretary of the Department of Housing and Urban Development, et al., Defendants.

No. 73 Civ. 3475 (MP).

United States District Court,
S. D. New York.

May 22, 1974.

POLLACK, District Judge.

Plaintiffs, low-income minority residents of Westchester County, have moved for a declaration of class action status, Fed.R.Civ.P. 23, and for a preliminary injunction, Rule 65, to restrain two federal agencies¹ from supplying funds under grants that have been approved to the Town of New Castle for the construction of sewer facilities and the clearance of a swamp area for recreational use. In connection therewith, plaintiffs challenge the Tri-State Regional Planning Commission's tacit approval of the grants in question.

Plaintiffs contend that all three agencies abdicated their responsibilities under the Civil Rights Acts² and the regulations promulgated thereunder in granting federal funds to New Castle.

All defendants oppose the motion for class declaration and have cross-moved to dismiss the suit. The Town of

¹ The Department of Housing and Urban Development ("HUD") and the Department of the Interior ("Interior").

² 42 U.S.C. §§ 2000d et seq. and 3601 et seq., popularly known as the Civil Rights Acts of 1964 and 1968.

Opinion of the District Court.

New Castle has applied for leave to intervene herein and to support the cross-application for dismissal.

Disbursement of the funds granted has been withheld pending determination of the claims presented herein.

Since it is the decision of the Court that the plaintiffs lack standing to bring this suit the plaintiffs' motions must be denied and the defendants' and the intervenor's motions must be granted and the complaint dismissed for the reasons which follow.

The History of the Grants.

In 1969, New Castle requested federal aid from HUD for the installation of a sewer system in Chappaqua, New York, pursuant to 42 U.S.C. § 3102. That section authorized the agency to make matching grants to local communities for the development of, *inter alia*, basic public sewer facilities. Similar federal funds were requested pursuant to 16 U.S.C. § 460l-8 from the Department of the Interior, Bureau of Outdoor Recreation ("BOR") in 1972 to aid the development of a public park and recreation area in what is known now as Turner Swamp.³ Both agencies, after due consideration and investigation into the proposals, agreed to provide the requested funds. Subsequently, the Suburban Action Institute (counsel for plaintiffs herein) filed informal complaints with both agencies protesting the respective grants. These complaints in effect raised the same objections which plaintiffs have now brought before this Court, namely, that the approval of the grants would deny members of racial minorities and low-income persons equal opportunity to benefit from the grants, and were thus violative of federal civil rights laws due to New Castle's exclusionary and discriminatory policies. In both instances, agency counsel replied that the

³ Both Chappaqua and Turner Swamp are sections of New Castle. The sewer project is formally located in the "King-Greeley Sanitary Sewer District".

Opinion of the District Court.

matter had been reviewed and that there was no legal basis for halting the grants.

Sometime after New Castle's applications were filed with them, both HUD and BOR forwarded the applications to the regional planning commission (defendant Tri-State) for comment, pursuant to federal regulations. Tri-State replied to both agencies that it would not review the applications as they were "non-regional" in significance and thus outside its jurisdiction.

Urging that the grants are violative of the "civil rights laws and policies", plaintiffs then brought the instant action for injunctive and other relief to prevent the flow of the federal funds to New Castle.

On the return of the motions before the Court a preliminary discussion with counsel indicated that it would aid any evidentiary hearing that might be required if the government were to file and serve copies of the administrative records of these grants and permit the plaintiffs to take depositions of officials and others involved in the consideration of the grants. At a later date the intervenor also requested an opportunity to examine the plaintiffs. Discovery to both sides was granted accordingly.

The plaintiffs have thus been accorded a wide opportunity to make a factual investigation of the New Castle applications and the civil rights enforcement procedures utilized by the federal defendants and the defendants have had an opportunity to elicit the facts concerning the interest of the plaintiffs. The legal issue of standing raised by the motions is now cast in sharp relief against this well-developed factual background.

The Town of New Castle.

New Castle is predominantly white and a well-to-do enclave. Almost 90% of New Castle is zoned for single-family, residential development on parcels of more than

Opinion of the District Court.

one acre; the median value of single-family homes in New Castle in 1970 was in excess of \$50,000. Median family income in New Castle in 1970 was \$22,005 compared with \$11,349 in Westchester as a whole. Westchester County's population is approximately ten percent non-white. The Town of New Castle is only 1.3% non-white. New Castle has been involved in a recent, well-publicized skirmish with the New York State Urban Development Corporation. In that contest, New Castle successfully thwarted the state agency's attempt to construct a small 100-unit low-cost housing facility in the town. It is thus clear that New Castle continues to be resistant to attempts to alter its present housing character.

The Motion of New Castle to Intervene.

On March 9, 1974—some seven months after the commencement of this action—the Town of New Castle applied for leave to intervene pursuant to Rule 24, Fed.R.Civ.P. Plaintiffs objected on the grounds of untimeliness of the application and because “delay” might be occasioned by an intervention.

Whether or not the motion to intervene was “timely” brought is a question of circumstances, and is not to be judged merely by the calendar. The lack of demonstrable prejudice to the plaintiffs from the allowance of the requested intervention is decisive here on the question of timeliness. *See, e. g., McCausland v. Shareholders Management Co.*, 52 F.R.D. 521 (S.D.N.Y.1971). *See also Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), cert. denied sub. nom *Trefina v. United States*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed. 115 (1971) (intervention allowed one year after commencement of suit; no showing of prejudice). New Castle has a primary interest in the grants involved herein and reason and equity indicate that its application for leave to intervene should be granted and it is so ordered pursuant to Fed.R.Civ.P. 24(a)(2).

*Opinion of the District Court.**Standing of Plaintiffs.*

The threshold, and decisive, issue in this case is whether plaintiffs have standing to bring this suit.

The law of standing is no mere arcane, procedural punctilio; the requirement that plaintiffs must have standing to sue goes to the very essence of the guarantee that “questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution.” *Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1955, 20 L.Ed.2d 947 (1968). *See also O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). Consequently, Courts are vigilant in requiring that litigants maintain a personal stake in the outcome of the controversies they present. *DeFunis v. Odegaard*, — U.S. —, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (Brennan, J., dissenting).

Justice Frankfurter referred to “standing” as a “complicated specialty of federal jurisdiction.” *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153, 156, 73 S.Ct. 609, 97 L.Ed. 918 (1953). The federal courts have long struggled to define the proper outer limits of this obscure, elusive and amorphous concept.⁴ The law is now clear that standing exists where plaintiffs can satisfy the two-pronged test that they have suffered—or will suffer—an injury in fact, and that they are at least arguably within the zone of interests protected by the relevant statute. *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Association of Data Processing*

⁴ *See generally Jaffe, Standing Again*, 84 Harv.L.Rev. 633 (1971).

Opinion of the District Court.

Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Warth v. Seldin, 495 F.2d 1187 (2d Cir., 1974).

Preliminarily, the statutes involved herein are not, as defendants contend, the community development grant statutes, 42 U.S.C. § 3102 and 16 U.S.C. § 460l-8. The statutes here involved are the 1964 and 1968 Civil Rights Acts (referred to sometimes as Title VI and Title VIII), and the regulations promulgated thereunder, which are claimed to prohibit federal agencies from granting funds to suburban areas which have discriminatory zoning and land-use regulations. The plaintiffs, undoubtedly as a result of the opportunity to make a factual investigation of the processing of the New Castle applications, have enlarged the charges in their earlier papers and the relief initially sought—they seek a finding from the Court that the existing HUD and Interior procedures fail to conform with the law in respect to community development grant applications; that those agencies should be compelled to adopt meaningful civil rights review procedures; that they have abdicated their responsibilities under the civil rights laws by alleged appalling neglect of the needs of minority and other low-income persons constrained to live in the intolerable environment of America's slums.

This "overview" (so denominated) suggests that plaintiffs in addition to their personal status should be considered as private attorneys general if that is necessary to permit them to assert these claims. The standing of the plaintiffs to raise their points arises, if at all, not under the community development grant statutes but, under the umbrella of the Civil Rights Acts.

The Supreme Court has declared that the Civil Rights Acts evince a congressional intention to define standing as broadly as is permitted by Article III of the Constitution. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S.

Opinion of the District Court.

205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). *See also* *Hackett v. McGuire*, 445 F.2d 442 (3d Cir. 1971). However, even if plaintiffs are deemed to be within the ambit of the Civil Rights Acts, that by itself does not satisfy the "two-pronged" standing requirement noted above. For it is the existence of an *injury in fact* which is the *sine qua non* of standing; there must be, at base, some threatened or actual injury to the plaintiffs resulting from the putatively illegal action before a federal court may assume jurisdiction. Litigants who seek to vindicate their own value preferences through the judicial process where there is neither injury in fact to plaintiffs nor a personal stake in the outcome of the controversy, viz., an actual and immediate interest, lack standing to sue. *O'Shea v. Littleton*, *supra*; *Linda R. S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). *See also* *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).

While the Supreme Court has expanded considerably the notion of what constitutes "injury" for purposes of standing, the requirement of injury is still a cardinal requirement, even where statutory issues are raised. *Compare* *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (very slight injury shared by many sufficient for standing) *with* *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (no injury alleged). *See also* *Brookhaven Housing Coalition v. Kunzig*, 341 F.Supp. 1026 (E.D.N.Y. 1972). As was noted in *Sierra Club*,

broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury. 405 U.S. at 738.

Opinion of the District Court.

See also *Linda R. S. v. Richard D.*, *supra*, at 617.⁵ The lack of any injury to these plaintiffs precludes the Court from any further inquiry herein.

In seeking to erect standing for themselves, plaintiffs would have the complaint read in a vacuum rather than in relation to New Castle and plaintiffs' connection therewith. To be justiciable, their disagreement with the agency policies must, however, be connected to the alleged illegal activity, to wit, the funding of the New Castle projects. Plaintiffs do not, and apparently cannot, allege that they will suffer any injury from the grants that have been made by the agencies. They have not shown that they have suffered or will suffer any injury "aris[ing] out of, or relat[ing] to, the application of the procedures in question." *Jenkins v. McKeithen*, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed. 2d 404 (1969). While it is doubtless true that plaintiffs' present alleged ghetto living conditions are a very real and very serious "injury", that "injury" is no way linked to the particular grants complained of herein. Nor would restraining deliverance of the federal funds in any way alleviate their situation. Furthermore, plaintiffs' status as "potential residents" of New Castle does not create an injury where none exists. Indeed, the recent decision in *Warth v. Seldin*, *supra*, dealt precisely with the issue of potential residents as injured parties in the context of a frontal attack on the restrictive zoning laws of a small upstate New York town. There, as here, none of the plaintiffs claimed that anyone refused to sell or lease housing to them; there, as here, plaintiffs neither had nor claimed any

⁵ "[F]ederal judicial power is to be exercised to strike down legislation . . . only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action." *Poe v. Ullman*, 367 U.S. 497, 504, 81 S.Ct. 1752, 1756, 6 L.Ed.2d 989 (1961) (Frankfurter, J.). See also *D.C. Federation of Civic Associations v. Airis*, 275 F.Supp. 533 (D.D.C. 1967).

Opinion of the District Court.

interest in land within the town or any connection with any plan to construct housing for them within the town. Dismissing the complaint for lack of standing, the Court of Appeals tersely stated that the plaintiffs lacked the necessary "personal stake in the outcome of the controversy". 495 F.2d at 1192. See also *O'Shea v. Littleton*, *supra*; *Sierra Club v. Morton*, *supra*. The Court continued:

The essence of their complaint is that the zoning practices of the appellees are unfair. However true that charge may be, absent a showing that appellants themselves have suffered from these practices they lack standing to challenge them. Their dispute with appellees reflects primarily a political disgruntlement. They indicate no benefit which a judgment favorable to them would produce. They allege neither capability nor intent to construct housing for themselves on any land which the court might order rezoned as an element of relief.

Although the complaint in this case is admittedly not aimed directly at overturning zoning laws, as in *Warth*, it is clear that the legality of New Castle's zoning must of necessity be at the core of any ultimate determination of this controversy. To declare the federal policies unlawful, it would have to be established that New Castle's zoning laws result in unconstitutional racial and economic segregation. On their face, at least, the HUD and BOR grants clearly insure that New Castle must not discriminatorily administer the sewer or swamp projects;⁶ therefore, plain-

⁶ The relevant HUD and BOR files indicate that every effort has been made to insure compliance with the Civil Rights Acts in the administration of the funds, as dictated by federal regulations. See, e. g., 24 C.F.R. § 1.4(2)(i). Thus, with respect to the BOR grant, the Town has signed an "Assurance of Compliance" form supplied by Interior to guarantee compliance with Title VI of the

(footnote continued on following page)

Opinion of the District Court.

tiffs' attack would have to be aimed at New Castle's land-use regulations. And it is precisely this sort of attack that *Warth* declared "potential residents" could not make.⁷ Potential residents, as such, can claim at best only a remote, speculative injury, and a speculative injury cannot be made the cornerstone of standing. *O'Shea v. Littleton, supra*. See also *Gaillot v. Department of Health, Education and Welfare*, 464 F.2d 598 (5th Cir. 1972).

Plaintiffs' further suggestion that if they do not have standing no one will, while having surface appeal, is similarly wide of the mark, both as a matter of law and fact. For one thing, the mere fact that a qualified plaintiff is not presently in Court in no way qualifies these, or any other, uninjured plaintiffs to litigate the issue posed here. To argue that everyone has standing simply because no one can now be found is a *reductio ad absurdum* that this Court cannot accept. Moreover, plaintiffs' argument ignores a class of plaintiffs that might well have the necessary stand-

(footnote continued from preceding page)

Civil Rights Act of 1964; furthermore, the General Provisions of the "Land and Water Conservation Fund Project Agreement" declares that "The [grantee] shall not discriminate against any person on the basis of race, color, or national origin in the use of any property or facility acquired or developed pursuant to this agreement", as well as a further assurance of compliance with Title VI and the regulations promulgated thereunder. The HUD agreement incorporates a similar "assurance of Compliance" form both as a separate document and as part of the grant agreement. And HUD's "Project Summary and Approval" form specifically concluded that, after examination, "[t]he proposed facilities will serve the applicant's area of jurisdiction without discrimination against any minority group."

⁷ Even if the issue of New Castle's zoning were eventually reached, it is at best doubtful whether that zoning would be declared *per se* unconstitutional in light of the Supreme Court's recent holding in *Village of Belle Terre v. Boraas*, — U.S. —, 94 S.Ct. 1536, 39 L.Ed.2d 797 (decided April 1, 1974). But see *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974).

Opinion of the District Court.

ing. Thus, for example, were some other, perhaps neighboring, town that had low-income housing and minority concentration to allege that it was denied federal funds in favor of New Castle's grants, it might perhaps be able to challenge the rating system of HUD and BOR which approved such grants. Since plaintiffs' main contention here appears to be that the federal defendants fail to properly take low-income and minority concentration into account when rating proposed funding projects, such a hypothetical plaintiff would be in a peculiarly appropriate position to complain, for its injury would have a direct nexus to the procedure challenged. *Per contra*, here the plaintiffs can point to no injury they personally have suffered because of the agencies' actions.⁸

Plaintiffs attempt as well to satisfy the standing requirement as federal taxpayers under the doctrine of *Flast v. Cohen, supra*. As a preliminary matter, *Warth v. Seldin, supra*, specifically disapproved of "taxpayer" challenges to zoning regulations. Furthermore, *Warth* reiterated the more general pre-*Flast* rule that

[a]s a general rule the interests of a federal taxpayer in federal expenditures are too "minute and indeterminate . . . fluctuating and uncertain" to provide a basis for standing. *Frothingham v. Mellon*, 262 U.S. 447, 487, 43 S.Ct. 597, 601, 67 L.Ed. 1078 (1923). 495 F.2d at 1191.

While the agency action complained of herein does indeed directly involve federal funding, there has been no showing by plaintiffs that the challenged action in any way adds to their tax burden. As such, there is no standing as federal

⁸ Plaintiffs' reliance for standing on the Administrative Procedure Act, 5 U.S.C. § 500 et seq., is similarly misplaced. That Act in no way expands the concept of standing; the plaintiffs still must show that they are "aggrieved" by the agency action before they can obtain judicial review. 5 U.S.C. § 702.

Opinion of the District Court.

taxpayers even assuming *arguendo* that the other strict requirements of *Flast* were to be met. Davis, Administrative Law Treatise (1970 Supp.) § 22.09-7; Carlsbad Union School District v. Rafferty, 300 F.Supp. 434 (S.D.Cal. 1969).

Thus, no matter in what light plaintiffs are viewed, they simply lack the necessary standing to bring this suit. And since the standing requirement is jurisdictional, the Court is constrained to avoid consideration of the merits of the case before it—tempting though that consideration may be. As Justice Blackmun wisely cautioned in his concurrence in *O'Shea v. Littleton*, *supra*, “[w]hen we arrive at that conclusion [that there is no standing], it follows, it seems to me, that we are precluded from considering any other issue presented for review.” See also *International Longshoremen's and Warehousemen's Union v. Boyd*, 347 U.S. 222, 223, 74 S.Ct. 447, 98 L.Ed. 650 (1954) (Frankfurter, J.).

Under all the facts and circumstances, therefore, the plaintiffs' motion for an injunction pursuant to Rule 65, Fed.R.Civ.P. is denied⁹ and the motions of the defendants and the intervenor to dismiss for lack of jurisdiction are granted. The complaint is dismissed pursuant to Rule 12(b)(1).

So ordered.

⁹ Since the complaint is dismissed, there is no need to reach plaintiffs' class action motion.

No. 76-601

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

RACHEL EVANS, ET AL., PETITIONERS

v.

**CARLA A. HILLS, SECRETARY OF HOUSING AND
URBAN DEVELOPMENT, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals on rehearing *en banc* (Pet. App. A1-A50) is reported at 537 F. 2d 589. The opinion of the original panel of the court of appeals (Pet. App. A51-A87) is reported at 537 F. 2d 571. The opinion of the district court (Pet. App. A89-A100) is reported at 376 F. Supp. 327.

JURISDICTION

The judgment of the court of appeals *en banc* was entered June 4, 1976. On August 18, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to November 1, 1976. The petition was filed on October 29, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTION PRESENTED

Whether lower-income, minority individuals have standing to challenge the award of federal sewer and recreational grants to a town, in which they do not live and where they have never sought to live, on the ground that the town's zoning ordinance and housing policies result in the exclusion of individuals such as themselves.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Clause 1 of the Constitution in pertinent part provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States * * * [and] to Controversies to which the United States shall be a party * * *.

STATEMENT

Petitioners, four low- or moderate-income minority residents of Westchester County, New York, brought this action in the United States District Court for the Southern District of New York, alleging, *inter alia*, that the federal respondents violated the Fifth Amendment and the Civil Rights Acts of 1964 (78 Stat. 252, as amended, 42 U.S.C. 2000d) and 1968 (82 Stat 81, 42 U.S.C. 3601 *et seq.*) by approving federal sewer and recreational grants to the town of New Castle, New York (Pet. 3; C.A. App. 12a-14a).¹

New Castle is a suburban community in Westchester County. In 1969, acting through the specially organized King-Greeley Sanitary Sewer District, New Castle requested aid from the Department of Housing and Urban

¹"C.A. App." refers to the Joint Appendix filed in the court of appeals, a copy of which is being lodged with the Court.

Development for construction of a sanitary sewer system pursuant to the Community Facilities and Advance Land Acquisition Program, 79 Stat. 490, as amended, 42 U.S.C. (Supp. V) 3102 (Pet. App. A90).² The King-Greeley district is approximately one square mile in area, is almost entirely developed, and is zoned for residential use on one-quarter and one-half acre parcels and for commercial use (C.A. App. 46a-47a). The then-existing sewage disposal system, which consisted of cesspools and septic tanks, had become inadequate, and seepage constituted a public health hazard (C.A. App. 48a).

HUD approved a grant of \$358,000 for the sewer project (Pet. App. A68-A69). In evaluating the grant application, HUD employed a rating system based upon various factors such as financial need, housing considerations, health, and job and business opportunities (C.A. App. 222a). Based upon New Castle's shortage of low-income housing, it received a zero in one category (C.A. App. 189a, 228a). Nevertheless, the overall rating was sufficient, although just barely so, to obtain the award (C.A. App. 151a, 176a).³ In receiving the grant, King-Greeley executed an assurance of its compliance with HUD's regulations under the Civil Rights Act of 1964 (C.A. App. 76a).

New Castle was also awarded a grant from the Department of Interior pursuant to the Land and Water Conservation Fund Act of 1965, 78 Stat. 900, as amended,

²This program has since been superseded by the block grant community development program established by the Housing and Community Development Act of 1974, 88 Stat. 633, 652, as amended, 42 U.S.C. (Supp. V) 5301, 5316.

³The original rating sheet for the King-Greeley application was lost (C.A. App. 220a). The rating sheet was reconstructed by the HUD area official who had prepared the original. He testified that the scores awarded on the reconstructed rating sheet were identical to those on the original (C.A. App. 191a-192a).

16 U.S.C. (Supp. V) 4601-8, to assist in developing as a recreational area the 38 acre Turner Swamp, a marshy area unsuited for housing development (Pet. App. A90; C.A. App. 52a-53a). As a condition of receiving the grant, New Castle gave its assurance that no person would be denied the benefits of the Turner Swamp program on grounds of race (Pet. App. A97, n. 6; C.A. App. 77a).

The Suburban Action Institute suggested that both federal agencies disapprove their respective grants because of New Castle's allegedly discriminatory housing policies (C.A. App. 30a). The agencies reviewed the matter and determined there was no basis for halting the grants (Pet. App. A90-A91; C.A. App. 118a-122a).⁴

Petitioners then instituted this action, purporting to represent all black or Spanish-speaking residents and all low- or moderate-income residents of Westchester County "who are denied the opportunity to share in Federal benefits extended to the Town of New Castle as a result of the zoning, housing and land use practices engaged in by the Town" (C.A. App. 6a). They sought to enjoin the federal agencies from supplying funds pursuant to their grants. Following discovery, the district court found that petitioners had not alleged or shown either that the award of the sewer and recreation grants to New Castle would injure them or that enjoining the two grants would alleviate the

⁴In the course of that investigation, a regional HUD official reviewed the rating sheet for the King-Greeley project and concluded that the rating should have been lower in the category of financial need (C.A. App. 172a-176a). Although the project would not have been funded originally with this lower rating, HUD determined that there was no basis for cancelling the outstanding grant (C.A. App. 176a-179a). Steps were taken, however, to improve training of the area HUD personnel who performed the financial ratings (C.A. App. 180a).

alleged deprivation of housing opportunities (Pet. App. A96); the court thereupon dismissed the complaint, holding that petitioners lack standing (Pet. App. A89-A100).

A panel of the court of appeals initially reversed the district court's decision (Pet. App. A51-A87); however, upon rehearing *en banc*, the court affirmed the dismissal of the complaint (Pet. App. A1-A50). Relying primarily upon *Warth v. Seldin*, 422 U.S. 490, which had been decided after the original panel's decision, the court held that petitioners had failed to allege a sufficiently concrete injury to entitle them to invoke judicial resolution of the dispute (Pet. App. A4-A5; footnote omitted):

[Petitioners] do not reside in the Town. They make no claim that they have ever sought or been refused housing in the Town. They have no interest in any Town property, or connection with any past or proposed housing project in the Town. They do not allege that either of the challenged projects will discriminate against them. They make no claim that the federal funds were diverted from any actual or proposed housing project that could have been of benefit to them. In short, they allege no specific, personal, adverse results whatsoever from the grants for sewer and park construction.

ARGUMENT

The issue presented here involves only an application of the settled principles of standing to the facts of this case. The court below correctly applied those principles, and its decision does not conflict with that of any other circuit. Moreover, the case has lost its practical significance because both of the projects at issue have been completed and both grants have been paid, except for a small balance on the

sewer grant that has been withheld pending a final audit.⁵ In addition, the statutory program under which the sewer grant was made has been superseded by a program that prescribes a new standard for review of grant applications.

1. In *Warth v. Seldin*, 422 U.S. 490, this Court held that low-income minority residents of one city, Rochester, New York, lacked standing to challenge a zoning ordinance of an adjacent community, Penfield, New York. The Court stated that to establish standing in such a case, a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention" (422 U.S. at 508; emphasis in original). Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization*, No. 74-1124, decided June 1, 1976, (slip op. 11; footnote omitted), the Court observed that "when a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." Accord: *Singleton v. Wulff*, No. 74-1393, decided July 1, 1976.

⁵The federal respondents voluntarily withheld disbursement of the two grants while the case was pending in the district court (Pet. App. A90). Following that court's dismissal order and the denial of a stay pending appeal by the court of appeals, however, the grants were released. In its brief in the court of appeals, on rehearing *en banc*, New Castle stated that the Turner Swamp project had been completed, that the grant from the Department of Interior had been paid in full, that the sewer project had been virtually completed, and that the HUD grant had been paid except for a small balance. Brief for Intervenor-Appellee on Rehearing En Banc at 49, n. See also New Castle's Brief in Opposition at 11. We are advised by HUD and New Castle that the sewer project has now been completed, although a small amount of the grant remains unpaid.

Petitioners here have not made such a showing. To the contrary, they have stipulated that none of them has ever sought housing in New Castle (C.A. App. 85a),⁶ they do not allege that the two grants to New Castle deprived them of any actual housing opportunities (C.A. App. 11a-12a), and they have not shown how a denial of funds to New Castle would inure to their benefit. As the court of appeals stated, "appellants have failed to allege *any facts whatsoever* indicative of injury suffered by them as a result of the grants to the District and the Town" (Pet. App. A15; emphasis in original).

Petitioners cannot demonstrate that the relief they sought—an injunction preventing payment of the sewer and recreational grants to New Castle—would have alleviated their housing situation. Since petitioners do not allege that the two grants deprived them of any housing opportunities, "there is even less likelihood in this case [than in *Warth*] that an injunction restraining the federal agencies would result in any betterment of [petitioners'] housing status in the County" (Pet. App. A15-A16).

The view of the dissenting judges below that the two grants might injure petitioners by perpetuating racially and economically concentrated residential patterns (Pet. App. A34-A37) is contrary to the record. Turner Swamp is unsuited for residential development, and petitioners do not claim that it could be developed for any use other than the proposed recreational open space (Pet. App. A36, n. 15).

⁶Rachel Evans, the only petitioner whose deposition was taken, stated that she resides in decent, integrated public housing and that she does not intend to seek other housing (C.A. App. 65a). She further stated that she does not know the area known as King-Greeley and that she does not know where Turner Swamp is located (C.A. App. 65a-66a). She objects to the two grants on the ground that federal assistance should not be given to wealthy communities (C.A. App. 67a).

Petitioners produced an affidavit stating that the King-Greeley sewer as planned will not have the capacity to serve a high-density population (Pet. App. A36; C.A. App. 30a).⁷ However, the area to be served by the sewer is already developed, has little capacity for new buildings, contains multi-family housing and most of the area residents are lower- and middle-income persons (C.A. App. 46a-50a). Thus, the majority of the court below correctly held that petitioners have not been injured by either of the two grants at issue, and that the relief requested would not benefit them.

This result is not altered by the fact that petitioners base their claim upon the Civil Rights Acts of 1964 and 1968. The court below recognized (Pet. App. A10) that the Civil Rights Act of 1968 defines "standing as broadly as is permitted by Article III of the Constitution." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209. Nonetheless, "Art[icle] III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself * * *." *Warth v. Seldin*, *supra*, 422 U.S. at 501. Petitioners have not satisfied this requirement with respect to the approval of the sewer and recreational grants.

2. The disagreement regarding the two grants has lost its practical significance. Both projects have been completed, and the two grants have been paid, except for a small amount of the sewer grant (see note 5, *supra*).

Moreover, the statutory program pursuant to which the sewer grant was made, 42 U.S.C. (Supp. V) 3102, has been superseded by the block grant community development program created by the Housing and Community Development Act of 1974, 88 Stat. 633, 652 as amended, 42 U.S.C. (Supp. V) 5301, 5316. *Cf. Hills v. Gautreaux*, 425 U.S. 284, 303-305. One of the numerous objectives of the new block grant program is "the spatial deconcentration of housing opportunities for persons of lower income * * *." 42 U.S.C.

⁷This factual claim has been contested (C.A. App. 49a-50a).

(Supp. V) 5301(c)(6). To obtain a grant, a community must, *inter alia*, submit a housing assistance plan that includes an assessment of the housing needs of low-income persons residing in or expected to reside in the community. 42 U.S.C. (Supp. V) 5304(a)(4)(A); 24 C.F.R. 570.303(c). The plan also must specify an annual goal for the number of dwelling units or persons to be assisted and indicate the general locations of lower-income housing. 42 U.S.C. (Supp. V) 5304(a)(4)(B) and (C). The Secretary is authorized to disapprove a grant application if the applicant's description of its community and housing needs and objectives is "plainly inconsistent" with generally available facts and data or if the activities to be undertaken with the proposed grant are "plainly inappropriate to meeting the needs and objectives identified by the applicant * * *." 42 U.S.C. (Supp. V) 5304(c). *Cf. City of Hartford v. Town of Glastonbury*, C.A. 2, Nos 76-6049, 76-6050, 76-6059, decided December 23, 1976. Thus, the block grant program sets forth in detail a new congressionally prescribed method for meeting the kind of concerns that underlie petitioners' claims in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1977.

DEC 18 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. **76-601**

RACHEL EVANS, STEVEN R. KIDD, FERNELL
PATTERSON, WALTER V. BROOKS, JR.,

Petitioners,

vs.

CARLA A. HILLS, Secretary, Department of Housing and
Urban Development, JOSEPH D. MONTICCILO,
Area Director, New York Office Department of Housing
and Urban Development, S. WILLIAM GREEN, Re-
gional Administrator, Department of Housing and
Urban Development, THE DEPARTMENT OF HOUS-
ING AND URBAN DEVELOPMENT, THOMAS S.
KLEPPE, Secretary of the Department of the Interior,
DARREL LEWIS, Director of the Bureau of Outdoor
Recreation of the Department of the Interior, THE
DEPARTMENT OF THE INTERIOR, and THE
TOWN OF NEW CASTLE,

Respondents.

**BRIEF OF RESPONDENT THE TOWN OF NEW CASTLE
IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

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TABLE OF CONTENTS

	PAGE
Table of Authorities	i
Counter-Statement of Question Presented	2
Statement of the Case	2
Reasons Why the Writ <i>Should be Denied</i>	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

<i>Association of Data Processing Serv. Organizations, Inc. v. Camp</i> , 397 U.S. 150 (1970)	6, 7, 8, 10
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	7, 8
<i>Barrows v. Jackson</i> , 346 U.S. 249 (1953)	7
<i>California Bankers Assoc. v. Schultz</i> , 416 U.S. 21 (1974)	6
<i>Construction Ind. Ass'n, Sonoma Co. v. City of Petaluma</i> , 522 F.2d 897 (9th Cir. 1975), cert. denied, 96 S. Ct. 1148 (1976)	10
<i>Cook v. Hirschberg</i> , 258 F.2d 26 (2d Cir. 1958)	4
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974)	11
<i>Ex parte Levitt</i> , 302 U.S. 633 (1937)	7
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968)	6
<i>Gray v. Greyhound Lines, East</i> , 45 U.S.L.W. 2207 (D.C. Cir. October 13, 1976)	10
<i>International Longshoremen's & Warehousemen's U. v. Kuntz</i> , 334 F.2d 165 (9th Cir. 1964)	4

	PAGE
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	6, 7
<i>Linda R.S. v. Richard D.</i> , 410 U.S. 614 (1973)	6
<i>Malamud v. Sinclair Oil Corp.</i> , 521 F.2d 1142 (6th Cir. 1975)	10, 11
<i>Moose Lodge No. 107 v. Irvis</i> , 407 U.S. 163 (1972) ..	7
<i>Nat. U. of Hospital & Health Care Emp. v. Carey</i> , 409 F. Supp. 1197 (S.D.N.Y. 1976)	11
<i>Norton v. McShane</i> , 258 F.2d 56 (2d Cir. 1958)	4
<i>O'Shea v. Littleton</i> , 414 U.S. 488 (1974)	6, 7
<i>Paton v. La Prade</i> , 524 F.2d 862 (3d Cir. 1975)	11
<i>Schlesinger v. Reservists to Stop the War</i> , 414 U.S. 488 (1974)	7
<i>Scodari v. Alexander</i> , 69 F.R.D. 652 (E.D.N.Y. 1976) ..	11
<i>Sierra Club v. Morton</i> , 405 U.S. 727 (1972)	6, 7, 8
<i>Simon v. Eastern Ky. Welfare Rights Org.</i> , 44 U.S. L.W. 4724 (1976)	6, 9, 10
<i>Singleton v. Wulff</i> , 49 L.Ed. 2d 826 (1976)	7, 10
<i>Tileston v. Ullman</i> , 318 U.S. 44 (1943)	7
<i>United Farm. of Fla. H. Proj., Inc. v. City of Delray Beach</i> , 493 F.2d 799 (5th Cir. 1974)	9
<i>United States v. Raines</i> , 362 U.S. 17 (1960)	7
<i>United States v. Richardson</i> , 418 U.S. 166 (1974)	7
<i>United States v. SCRAP</i> , 412 U.S. 669 (1973)	8
<i>Village of Belle Terre v. Boraas</i> , 416 U.S. 1 (1974) ..	10
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	6, 7, 8, 10
<i>Ybarra v. City of Town of Los Altos Hills</i> , 503 F.2d 250 (9th Cir. 1974)	10

Statutes:	PAGE
5 U.S.C. 702	8
42 U.S.C. 3610	8
42 U.S.C. 5301	11
Rules:	
Fed. R. Civ. P. 12(b)	4
Other Authorities:	
6 Moore's, <i>Federal Practice</i> (2d ed. 1976)	4

IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No.

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON,
WALTER V. BROOKS, JR.,
Petitioners,

vs.

CARLA A. HILLS, Secretary, Department of Housing and
Urban Development, JOSEPH D. MONTICCILOLO, Area Direc-
tor, New York Office Department of Housing and Urban
Development, S. WILLIAM GREEN, Regional Administra-
tor, Department of Housing and Urban Development,
THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
THOMAS S. KLEPPE, Secretary of the Department of the
Interior, DARREL LEWIS, Director of the Bureau of Out-
door Recreation of the Department of the Interior, THE
DEPARTMENT OF THE INTERIOR, and THE TOWN OF NEW
CASTLE,

Respondents.

**BRIEF OF RESPONDENT THE TOWN OF NEW CASTLE
IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI**

Respondent, The Town of New Castle (hereafter
"Town") respectfully opposes the petition for certiorari
filed by petitioners to review the judgment of the United
States Court of Appeals for the Second Circuit, *en banc*,
which affirmed the dismissal of the petitioners' complaint
for lack of standing.

Counter-Statement of Question Presented

Did the Court of Appeals for the Second Circuit correctly apply established principles of "case and controversy" and "standing" in dismissing petitioners' complaint where petitioners' complaint failed to allege that the challenged agency actions in approving the sewer and park grants caused petitioners actual or threatened injury in fact and where the stipulated record facts confirm the absence of any injury.

Statement of the Case

The instant lawsuit represents a coercive effort to enjoin the funding of two federal grants to admittedly non-discriminatory projects having nothing to do with housing in order to induce a change in Town's existing zoning ordinance. The grant of the Department of Housing and Urban Development ("HUD") to the King-Greeley Sewer District ("King-Greeley") is for the construction of a new sewer system to replace the inadequate septic system previously in use (47a-52a).^{*} The grant of the Bureau of Outdoor Recreation, Department of the Interior ("BOR") to Town is for the development and use of Turner Swamp as a wetlands preserve for environmental, educational and recreational use (52a-54a).

No claim is raised by petitioners that Town or King-Greeley have in the past barred, or intend in the future to bar, persons from the use of the sewer and admission to the park facilities on the basis of race, creed, religion, national origin or other unlawful basis (85a).

By written stipulation of facts, dated April 5, 1974 (84a-86a), petitioners stipulated:

(1) None of the named plaintiffs had sought housing in Town (par. 1);

^{*} References designated "a" are to pages of the Joint Appendix filed with the court of appeals.

(2) None of the named plaintiffs or any political subdivision in which they reside applied for or was deprived of any of the federal funds granted to Town and King-Greeley (par. 2); and

(3) Plaintiffs do not claim that the sewer and park projects will be operated on a discriminatory basis, and that the benefits of the projects will be denied to persons on the basis of race, creed, color or income (pars. 3, 4).

(4) Plaintiffs do not claim that the present swamp area to be used for the proposed park at any time has been utilized for low and moderate income multi-family housing (par. 5).

The complaint does not name Town or King-Greeley as party defendants (1a-16a). Nonetheless, an injunction is demanded restraining disbursement of the federal funds "until New Castle ceases from engaging in land use practices which exclude minority and low-income people from its boundaries" as well as a declaratory judgment and other relief (14a-16a).

The relief sought is predicated on allegations directed against Town's zoning ordinance, which has been in effect since 1930 (46a).^{*} Thus, the complaint alleges that Town engaged in "discriminatory land use practices" (3a, 4a, 6a, 9a) by reason of its existing zoning ordinance which provides for single-family residential development and prohibits multi-family housing, thereby in effect mandating "only the most expensive form of housing in New Castle" (11a). This condition, according to the complaint, means that "only the most wealthy can afford to live in New Castle," and has resulted in "a disproportionately white, disproportionately wealthy population" and in the exclusion

^{*} The Town's zoning map was before the district court, and shows the various areas of Town zoned for residential, commercial and industrial uses (70a).

of low income black and Spanish speaking people (10a-11a).*

The complaint alleges that the federal respondents, in approving the King-Greeley sewer grant and the Town park grant, failed in their duty to promote fair housing and violated the Fifth Amendment and various federal statutes (14a-16a). In this regard, the district court specifically found:

The relevant HUD and BOR files indicate that every effort has been made to insure compliance with the Civil Rights Acts in the administration of the funds, as dictated by federal regulations. *See, e.g.*, 24 C.F.R. § 1.4(2)(i). Thus, with respect to the BOR grant, the Town has signed an 'Assurance of Compliance' form supplied by Interior to guarantee compliance with

* Petitioners' complaint is rebutted by, among other things, the sworn affidavit of Richard E. Burns, Town Supervisor, submitted to the district court in support of Town's motion to dismiss for a lack of standing and in opposition to petitioners' motion for a preliminary injunction (44a-62a). Mr. Burns testified that King-Greeley is approximately one square mile in size and is the oldest and most settled portion of the hamlet of Chappaqua, and the majority of its residents are persons of the lower and lower-middle income ranges, including many of the Town's municipal employees as well as senior citizens. By far the greater majority of houses in King-Greeley are more than 30 years old, including some multiple dwellings constructed prior to the 1930 enactment of Town's zoning ordinance. In addition, there are four religious facilities, numerous businesses, the local public library, and two schools. King-Greeley contains more than 330 structures, and has been characterized as "densely populated" (46a). These facts have not been rebutted and must be accepted as true. Where affidavits are introduced on a Rule 12(b) motion, an opposing party may not rely on the complaint, but must disclose the facts upon which his case is based. A failure to do so ends his entitlement to have the pleadings liberally construed in his favor. *E.g., Cook v. Hirschberg*, 258 F.2d 56, 57-58 (2d Cir. 1958); *accord, Norton v. McShane*, 332 F.2d 855, 861 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1968); *International Longshoremen's & Warehousemen's U. v. Kuntz*, 334 F.2d 165 (9th Cir. 1964); 6 *Moore's Federal Practice*, ¶ 56.22 [2] at 56-1337 (2d ed. 1976).

Title VI of the Civil Rights Act of 1964; furthermore, the General Provisions of the 'Land and Water Conservation Fund Project Agreement' declares that 'The [grantee] shall not discriminate against any person on the basis of race, color, or national origin in the use of any property or facility acquired or developed pursuant to this agreement', as well as a further assurance of compliance with Title VI and the regulations promulgated thereunder. The HUD agreement incorporates a similar 'assurance of Compliance' form both as a separate document and as part of the grant agreement. And HUD's 'Project Summary and Approval' form specifically concluded that, after examination, '[t]he proposed facilities will serve the applicant's area of jurisdiction without discrimination against any minority group. (A97-98, n.6).*

This finding of fact was not disturbed on appeal.**

The district court in a well reasoned opinion dismissed the complaint for lack of jurisdiction, holding that petitioners lacked standing under the principles enunciated in a series of decisions of this Court. The district court correctly observed, among other things, that plaintiffs could

* References designated "A" are to petitioners' Appendix to Petition for Writ of Certiorari filed with this Court.

** Petitioners' argument that Town's application should have received no more than 30 points rather than the 41 points shown on the HUD original rating sheet (Petition, p. 6), is factually incorrect. The principal difference between the *de novo* rating and the original rating resulted from incorrect data used in the *de novo* rating. Financial need in the *de novo* rating was based on the median family income for Town taken from the 1970 census (175a). Such data has no relevancy to King-Greeley which was the applicant for the HUD grant as it is undisputed that the median income for King-Greeley is considerably lower than that of the Town as a whole (51a). Petitioners' argument rests on a deposition conducted by them prior to Town's intervention. Such testimony is inherently unreliable since it has not been tested in the crucible of cross-examination. The admissibility and credibility of such testimony was not determined by the district court and is not properly includable in an appellate record.

not challenge Town's zoning since "none of the plaintiffs claimed that anyone refused to sell or lease housing to them; . . . [and] plaintiffs neither had nor claimed any interest in land within the town or any connection with any plan to construct housing for them within the town" (A96-97). The court of appeals affirmed.

Reasons Why the Writ Should be Denied

1. The opinion of the court of appeals clearly demonstrates that its conclusion that petitioners lack standing to sue and fail to satisfy the Article III requirement of "case or controversy" is based on a straightforward reading of *Warth v. Seldin*, 422 U.S. 490 (1975). Rather, that court's judgment of dismissal is firmly grounded on a long line of "standing" decisions of this Court which require that a plaintiff satisfy the "case or controversy" prerequisite by demonstrating actual or threatened injury in fact. *E.g.*, *Simon v. Eastern Ky. Welfare Rights Org.*, 44 U.S.L.W. 4724 (1976); *Warth v. Seldin*, *supra*; *United States v. Richardson*, 418 U.S. 166, 175 (1974); *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *California Bankers Assoc. v. Schultz*, 416 U.S. 21, 68-69 (1974); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617-18 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972); *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

This Court has recognized, in addition to the constitutional mandate of standing, other prudential limitations on the rights of persons to invoke a federal court's decisional and remedial powers. Standing involves a two-pronged test: a plaintiff must seek the protection of an interest "arguably within the zone of interests" of the statutory provision he claims has been violated and he must suffer injury in fact from the challenged action. *Association of Data*

Processing v. Camp, *supra*, 397 U.S. at 152-53; *Barlow v. Collins*, 397 U.S. 159 (1970). A "generalized grievance" shared in substantially equal measure by all or a large number of citizens does not meet this test; a plaintiff must allege an injury to himself even though it may be shared by numerous others. *Warth v. Seldin*, *supra*, 422 U.S. at 501; *Schlesinger v. Reservists to Stop the War*, *supra*, 418 U.S. at 225; *United States v. Richardson*, *supra*, 418 U.S. at 180; *accord*, *Ex parte Levitt*, 302 U.S. 633 (1937). Thus, a plaintiff generally must assert his own legal rights and interests and not those of third parties. *Compare Singleton v. Wulff*, 49 L. Ed. 2d 826, 833 (1976) and *Barrows v. Jackson*, 346 U.S. 249, 255 (1953) with *Laird v. Tatum*, 408 U.S. 1, 13 n.7 (1972); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972); *United States v. Raines*, 362 U.S. 17, 21 (1960); *Tileston v. Ullman*, 318 U.S. 44 (1943).

Injury in fact must be personal to the plaintiff and be real and immediate. While the injury need not necessarily be economic, *Sierra Club v. Morton*, *supra*, it must be concrete—"Abstract injury is not enough". *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

At bar, the court of appeals and the district court concluded that petitioners had failed to demonstrate this requisite injury in fact, and thus had failed to present a "case or controversy". Under such circumstances, it was unnecessary for the court below to consider the additional prudential limitations of standing.* Petitioners misconstrue the thrust of the decision below and argue, in effect, that *Warth* was improperly extended to the case at bar, since the instant action is predicated on a federal statute, a factor not present in *Warth*. Admittedly, Congress may by

* Thus, the court of appeals did not deem it necessary to reach the question as to whether under the facts at bar the enforcement provisions of the Fair Housing Act provide a private right of action to obtain judicial review of HUD's alleged maladministration of the Act. See separate concurring opinion of Judge Mansfield (A23).

statute confer a right of action on persons where none would exist absent such statute. But the existence of such statute does not *ipso facto* abrogate the constitutional requirement of "injury in fact". As. Mr. Justice Powell stated in *Warth v. Seldin*:

[C]ongress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. 422 U.S. at 501 (citations omitted).

Contrary to the suggestion of petitioners, section 10 of the Administrative Procedure Act, 5 U.S.C. 702, does not compel the conclusion that petitioners have standing absent injury in fact. Section 702 expressly embodies the requirement that a plaintiff proceeding thereunder be "adversely affected or aggrieved" by the challenged administrative action. This Court has interpreted standing under the Administrative Procedure Act to require compliance with the accepted two-prong standing test. *Sierra Club v. Morton, supra*, 405 U.S. at 733; *United States v. SCRAP*, 412 U.S. 669 (1973); *Association of Data Processing v. Camp, supra*; *Barlow v. Collins, supra*.

Nor does anything in Title VIII of the Fair Housing Act, upon which petitioners base their claim, support the notion that injury in fact is dispensed with when an action is brought to enforce an alleged duty under that statute. Under Title VIII, a right of action is granted to a "person aggrieved", a term defined in the statute as "[a]ny person who claims to have been injured by a discriminatory housing practice" 42 U.S.C. 3610(a). Title VIII thus expressly retains the conventional requirement that a plaintiff cannot bring a suit unless he has sustained a real and immediate injury as a result of the challenged action.

The court of appeals below was mindful that a federal court cannot ignore the requirement of Article III. In *Simon v. Eastern Ky. Welfare Rights Org.*, 48 L. Ed. 2d 450, 461 (1976), Mr. Justice Powell stated:

The necessity that the plaintiff who seeks to invoke judicial powers stand to profit in some personal interest remains an Article III requirement. A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies. (Footnote omitted).

That petitioners do not "stand to profit in some personal interest" is exemplified by the lower court's finding that the relief demanded by the complaint is not likely to improve their housing status (A15). Further, petitioners have stipulated that the subject federal funds would not otherwise have gone to the communities in which they presently reside (85a). To quote Judge Moore, "The link between the ill allegedly suffered and the remedy requested is so tenuous as to approach the non-existent" (A16).

The dissenting opinions below do not meet this issue of lack of injury in fact. The "injury" perceived by Judge Oakes stemming from plaintiffs' residence in a racially segregated housing environment cannot under the record facts at bar be attributed to the funding of the sewer and park projects.

There is no claim that use of the sewer will be improperly restricted. Compare *United Farm. of Fla. H. Proj., Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974). Nor do the complaint and record facts support Judge Oakes' assertion that challenged projects perpetuate segregated housing because they are "inconsistent with construction of high-density, low-cost housing in New Castle" (see A36). Indeed, the King-Greeley area of Town is already "densely populated" with much of the construction

antedating the 1930 zoning ordinance, and the sewer facility is sufficient in size to handle existing King-Greeley buildings as well as any new construction, including multi-family residential units and substantial business development (49a). Similarly, the speculation that the Turner Swamp wetlands preservation project might be different if it was developed to serve families in multi-family residences finds no support either in the allegations of the complaint or in the sworn affidavits and depositions which form the record herein.

Petitioners' characterization of Town's zoning as "restrictive" and "exclusionary" because it restricts certain areas to one-family dwellings (58a-62a) adds nothing to the substance of their complaint. The Town's zoning ordinance is neither unconstitutional nor discriminatory, and is within the reasonable exercise of the community's police power. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Construction Ind. Ass'n, Sonoma Co. v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976).

In sum, the decision and judgment of the court of appeals affirming dismissal of petitioners' complaint for lack of standing faithfully reflects the prior rulings of this Court and is consistent with this Court's recent decisions in *Simon v. Eastern*, *supra* and *Singleton v. Wulff*, *supra*.

2. The decision of the court of appeals below is in harmony with the case law of other circuits. A reading of the recent "standing" decisions of the lower federal courts subsequent to *Warth* discloses that there are no conflicting interpretations of *Warth*. Rather, the lower federal courts have continued to apply consistently the standing tests articulated by this Court in *Association of Data Processing v. Camp*, *supra*. See, e.g., *Gray v. Greyhound Lines East*, 45 U.S.L.W. 2207 (D.C. Cir. October 13, 1976); *Malamud*

v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975); *Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Nat. U. of Hospital & Health Care Emp. v. Carey*, 409 F. Supp. 1197 (S.D.N.Y. 1976); *Scodari v. Alexander*, 69 F.R.D. 652 (E.D.N.Y. 1976).

3. The judgment of the court of appeals rests in substantial part on the parties' written stipulation of facts which in itself negates the existence of any injury in fact. As such the instant action is not an appropriate vehicle for this Court's review should this Court desire to refine further its prior decisions on standing.

4. The instant decision will have little effect on other litigants and may well be moot as between the parties. As acknowledged by petitioners, the sewer grant program in question, a HUD categorical grant, has been superseded by the block grant community development program under the Housing and Community Development Act of 1974, 42 U.S.C. 5301 *et seq.* (Petition, p. 5n.). Accordingly, whatever change in procedure petitioners seek to impose upon the governmental respondents with respect to the HUD categorical grant at bar will have little, if any, bearing on future block grant applications.

In addition, Town has previously suggested this action may be moot. *DeFunis v. Odegaard*, 416 U.S. 312, 318 (1974). (Town Brief on rehearing *en banc*, p. 49n.). The wetlands project has been completed and the BOR grant has been paid in full. The sewer project has been completed, and is in use. The HUD grant has been paid, except for a small balance being withheld awaiting final audit of costs.

CONCLUSION

For the foregoing reasons, respondent Town respectfully urges this Court to deny petitioners' writ of certiorari.

Respectfully submitted,

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